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United efforts are being made by credit men and commercial lawyers to have the Bankrupt Act of 1898 amended in certain particulars. These suggestions for amendment are well stated and summarized in the resolution adopted by the Omaha Association of Credit Men on the 19th of December, 1901. The resolution is as follows:

WHEREAS, the value and benefit of a uniform system of bankruptcy throughout the United States has been fully demonstrated; and

WHEREAS, in the administration of the present law, there has developed the undoubted need of certain amendments; therefore be it

Resolved, that the Omaha Association of Credit Men express itself in hearty accord with the efforts now being put forth to amend the law, and most earnestly suggest and urge the consideration of the following recommendations:

First—That section 57g be clearly defined and state in unmistakable language that any and all payments made in good faith and in the ordinary course of trade shall not be considered preferences. Second—That the law be so amended as to vest in the United States courts complete, absolute, and exclusive jurisdiction in all matters pertaining to bankruptcy. Third—That a discharge be denied or revoked if the bankrupt has (1) committed an offense punishable by imprisonment as the law provides; or (2) failed to keep or refused to furnish books of account, records or such other information necessary to ascertain his true financial condition; or (3) his estate shall not have paid a dividend of at least 25 per cent.; or (4) obtained property on credit upon a false statement made by him to any person for the purpose of obtaining credit or of being communicated to the trade or to the person from whom he obtained such property on credit; or (5) make a fraudulent transfer of any portion of his property to any person; or (6) been granted a discharge in bankruptcy within six years; or (7) in the course of his proceedings refused to obey any lawful order of, or to answer any question approved by, the court; or (8) failed to file a correct or complete schedule of his assets; or (9) failed to attend one or the first meeting of his creditors; or (10) become insolvent through gambling, dissipation or willful neglect. Fourth—That the law provide for uniform exemptions. Fifth—That a bankrupt's wife be a competent witness and subject to examination. Sixth—That the bankrupt be required to attend for examination without expense to the estate at least one meeting of creditors. Seventh—That any person shall be required to attend as a witness before a referee regardless of the distance of his place of residence.

The fact that so little fault has been found with the present act furnishes strong evidence of the care and mature judgment of its framers. It is undoubtedly the most perfect bankrupt law ever devised, and we are not so certain whether, with probably one exception, the amendments suggested would add anything to the perfection of this excellent piece of legislation. The one amendment of those suggested, which, we are quite satisfied, would add to the popularity of the bankrupt law among business men, and one which is quite necessary to its fair administration, is that any and all payments made in good faith and in the ordinary course of trade shall not be considered preferences. No section of the bankrupt act has given more trouble to the courts than sec. 57g, and on no other section have the district and circuit courts been so radically divided in opinion. From congress alone can relief be expected in settling all disputes on this section by expressing the intent and extent of its provisions in such clear, unmistakable language as to put it absolutely beyond the field of controversy.

NOTES OF IMPORTANT DECISIONS.

ADMIRALTY—EXTENT OF STATE JURISDICTION OVER SHIPS AND SHIP OWNERS.—The recent case of Olson v. Birch, 65 Pac. Rep. 1032, involved the question of the right of the state to impose liability on vessels or their owners for services. The Supreme Court of California held that Code Civ. Proc. § 813 *et seq.*, providing that all vessels are liable for certain services; that actions therefor must be brought against the owners by name, if known, and the plaintiff may have the vessel attached as security,—is not, as applied to contracts not maritime, in conflict with

Const. U. S. art. 3, § 2, declaring that the jurisdiction of the federal courts shall extend to all cases of admiralty and maritime jurisdiction, or Rev. St. U. S. § 711, providing that "the jurisdiction of the federal courts in cases of admiralty and maritime jurisdiction is exclusive, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it. This claim did not arise from a maritime contract. It was for services in the construction of the ship, and also for services upon the ship, "as a member of her crew," but "while not engaged in active operation, and not in commission." The vessel had never been in commission, or in active use in navigation. The court, in discussing this point, said:

"The vessel not being at the time employed in navigation, and never having been so engaged, the contract was not maritime. This is completely settled by the case of Williams v. The Sirius (D. C.), 65 Fed. Rep. 226, and by the authorities quoted by the learned judge in that case. The libelant there claimed a lien, under these provisions of our Code for services rendered as watchman or shipkeeper. The vessel had been engaged in commerce, but was sold in San Francisco under *a venditioni exponas* issued from the district court. It was a British ship, but had not been enrolled as an American vessel after the sale, and was not in commission. After reviewing the authorities, the court was unable to hold that the services were of a maritime character, and therefore there was no lien under our state law cognizable in a court of admiralty. The Sirius had been engaged in navigation, but was laid up in her home port, and was unregistered, and out of commission. The point of the decision seems to be that the services, though rendered on the vessel, were not in furtherance of navigation, but were to preserve the vessel. A few authorities apparently holding a contrary doctrine are cited by appellants. The Eliza Ladd, 5 Sawy. 519, Fed. Cas. No. 4364; Revenue Cutter No. 2, 3 Sawy. 143, Fed. Cas. No. 11,714; The Manhattan (D. C.), 46 Fed. Rep. 797. The reasoning in the cases is similar, but The Manhattan is the more elaborate, and apparently most relied upon. In that case the hull was first built under contract, and then floated to a different point, where the ship was completed under a new contract. Proceedings *in rem* were instituted to recover upon this contract, and the jurisdiction of the district court was challenged on the ground that the contract was not of a maritime character. Judge Hanford referred to the fact that contracts for building ships are not maritime, while contracts for repairing and rebuilding ships are; and he said (correctly, I think) that it could make no difference whether the same work was done upon a new hull or an old hull, and then added: 'After a new ship has been launched, and embraced by the element upon which she is intended to float, and been christened, and become an entity fully capable of being identified, she is as much a subject of admiralty and maritime jurisdiction as she can be at any later period of her history; and contracts then entered into relating to her completion, equipment, or employment are maritime, and cognizable in admiralty.' Evidently there is here a misapprehension as to the basis of admiralty jurisdiction. It does not extend to ships merely because they are ships, but to commerce and navigation, and to ships only because they are, and while they are, used in commerce and navigation. A ship, while building, is not an instrument of commerce; nor is she while out of commission, and being cared for to preserve her for possible future use. A ship injured by use, and only temporarily laid up for repairs, or being refitted that she may resume her voyage, is considered still engaged in commerce."

SUBROGATION AND THE MODES OF ENFORCING IT.

The doctrine of subrogation merits the serious thought of every student and practitioner of law. It is a most fitting example of the fundamental principles of equity jurisprudence, and becomes of special interest to the practitioner because it affords a fertile field for litigation. Mr. Sheldon in his book on Law of Subrogation cites over five thousand cases and yet by no means exhausts the supply.

§ I. *Definition and General Principles.*— In looking over the various definitions, I find that each contains some material requisite not found in all of the others. I have, therefore, endeavored to borrow from all of them and frame into one definition all the elements neccessary to bring this equity into existence. Subrogation, therefore, may be defined as a legal fiction,[1] by force of which an obligation, that has been paid by a third person,[2] not a mere volunteer,[3] nor in his own wrong,[4] is treated in equity as still existing for the benefit of such third person, who is substituted to all the rights, remedies, and securities of another, whether as a creditor or as the holder of any other rightful[5] claim.[6]

The doctrine of subrogation is a creature of the civil law and was very widely extended in that system of jurisprudence.[7] Owing to the

[1] Acer v. Hatchkiss, 97 N. Y. 395; Furnold v. Missouri Bank, 44 Mo. 338.

[2] New Orleans Bank v. Eagle Cotton Co., 43 La. Ann. 814.

[3] Shinn v. Budd, 14 N. J. Eq. 234; Griffin v. Proctor, 14 Bush (Ky.), 571.

[4] Rowley v. Townsley, 53 Mich. 329; Sheldon, Subrogation (2d Ed.), sec. 44.

[5] Knouf's Appeal, 91 Pa. St. 78; Kelly v. Kelly, 54 Mich. 30; Reily v. Mayer, 18 N. J. Eq. 55; Crawford v. Richeson, 101 Ill. 351.

[6] Jackson v. Bayliston Ins. Co., 139 Mass. 508. For other definitions, see 2 Bouvier's Law Dictionary; Bishpham's Prin. Eq. (6th Ed.) sec. 335; King v. Dwight, 3 Rob. (La. [illegible]; Sheldon, Subrogation, sec. 1.

[7] Furnold v. Missouri Bank, 44 Mo. 338; New Orleans Bank v. Eagle Cotton Co., 43 La. Ann. 814.

dearth of the English common law precedents and the arbitrary disposition of its courts to cling rigidly to form, the right of subrogation could not be enforced at law.[8] But the equity courts, always ready to render real justice when it could not be obtained elsewhere, adopted this doctrine from the civil law.[9] Subsequently, however, the common law courts, being jealous of the growing power of the chancery division, began in many cases to apply these principles, especially in those jurisdictions in which equitable remedies came to be enforced through the forms of law.[10]

This doctrine having become a part of the English and American law, has kept pace with the growth of equitable principles until at the present time it exists in all its pristine vigor, and is extended to whomsoever as a matter of right and good conscience it should be applied.[11] This is especially true in the United States where, under the initial guidance of Chancellor Kent, it has been more widely developed and more genally administered than in England.[12]

The principle of subrogation is one of equity merely,[13] based upon natural justice, and is elastic enough to cover every case where one party pays the debt of another who is primarily liable therefor, and which in equity and good conscience should have been paid by the latter.[14] But it will not be extended to a mere volunteer in the absence of any agreement;[15] to the real debtor;[16] to one whose claim has been defeated at law;[17] to one who seeks subrogation through his own wrong or that of another;[18] nor at the expense of a legal right;[19] nor where it would work an injustice to those having equal equities;[20] nor in any case where it would prejudice the rights of others.[21] "It is a privilege to be used as a shield and not as a sword; not to do injustice, but to prevent it." It is treated as the child of equity, and is applied to secure real and essential justice regardless of form,[22] and independent of any privity of contract[23] or consideration[24] between the parties affected by it; a moral obligation being sufficient to call it forth.[25] But, of course, this right of subrogation may be modified or even extinguished by contract.[26]

Subrogation to the place of a creditor differs from an assignment of the debt, in that the latter does not extinguish the debt, but assumes its continued existence, while the former follows only upon its discharge.[27] The legal obligation must be extinguished before the right of subrogation can arise.[28]

Those persons for whose benefit the right of subrogation is applied may be logically divided into two general classes: first, the subrogation of parties holding subordinate interests in or claims against the same property, upon satisfying the superior claims for their own protection, to the rights of the superior claimant against such property; secondly, the subrogation of one of several debtors who has paid their joint debt or a charge held upon his property as well as that of others, whether under compulsion or for the protection of his own interests, against those debtors who, or the owner of that property which, ought to indemnify him, in whole or in part, against the burden which he has thus borne.[29]

This doctrine is often said to include the right of a creditor to be subrogated to the benefit of securities for the debt held by a surety, or by the debtor against one who has agreed with the principal to assume the burden of the debt. Although the creditor may sometimes proceed against such securities, yet, this is clearly no part of the law of subrogation, but is rather the

[8] Bispham's Prin. Eq. (6th Ed.), sec. 329.

[9] Furnold v. Missouri Bank, 44 Mo. 338; Shinn v. Budd, 14 N. J. Eq. 284; Springer v. Springer, 43 Pa. St. 518.

[10] Bispham's Prin. Eq. (6th Ed.) sec. 329; Granite Bank v. Hitch, 145 Mass. 567; Hall v. Nash. & Chatt. Ry. Co., 13 Wall. 307; Edgerly v. Emerson, 23 N. H. 555; Stephens v. King, 84 Me. 291; Dart v. Thomas, 87 Ill. 222.

[11] Harnsberger v. Yancey, 33 Gratt. (Va.) 527; Stevens v. Goodenough, 26 Vt. 676; Greenwell v. Heritage, 71 Mo. 459; Reddington v. Cornwell, Cal. 49.

[12] Furnold v. Missouri Bank, 44 Mo. 338; Bispham' Prin Eq. (6th Ed.), sec. 336, and cases cited.

[13] Meyer v. Mintonye, 106 Ill. 414; *In re* Hewitt 25 N. J. Eq. 210; Eaton v. Hasty, 6 Neb. 419.

[14] Greenwell v. Heritage, 71 Mo. 459; Reddington v. Cornwell, 90 Cal. 49; Harnsberger v. Yancy, 33 Gratt. (Va.) 438.

[15] Griffin v. Proctor, 14 Bush (Ky.), 571; Shinn v. Budd, 14 N. J. Eq 234.

[16] Underwood v. Metropolitan Bank, 144 U. S. 669; Acer v. Hotchkiss, 97 N. Y. 395; Thompson v. Haywoos, 129 Mass. 401; People's Bank v. Ballowe, 34 La. Ann. 565.

[17] Finks v. Mahaffy, 8 Watts (Pa.), 384; Williams v. Aylesvury Ry. Co., L. R. 9 Ch. 684; *In re* Coke, 19 Fed. Rep. 88.

[18] Railroad Co. v. Soutter, 13 Wall. 517; Griffith v. Townley, 69 Mo. 13; Johnson v. Moore, 33 Kan. 90; Boyer v. Bolender, 129 Pa. St. 324; Wilson v. Murray, 90 Ind. 477.

[19] Blake v. Koone, 71 Iowa, 357; Leib v. Stribling, 51 Md. 285; McGinniss' Appeal, 16 Pa. St. 445.

[20] Bunch v. Grave, 111 Ind. 351; Keely v. Cassidy, 93 Pa. St. 318; Crawford v. Richeson, 101 Ill. 3518; Greer v. Bush, 57 Miss. 575; Drake v. Paige, 127 N. Y. 562.

[21] Knouf's Appeal, 91 Pa. St. 78; Kelly v. Kelly, 54 Mich. 30; Reilly v. Mayer, 12 N. J. Eq. 55.

[22] Meyer v. Mintonye, 106 Ill. 414; Douglass v. Fogg, 8 Leigh (Va.), 598.

[23] Eaton v. Hasting, 6 Neb. 9; Hoover v. Epler, 52 Pa. St. 522.

[24] Cross v. Fruesdale, 28 Ind. 44; Lawrence v. Fox, 20 N. W. Rep. 268.

[25] Slock v. Kirk, 67 Pa. St. 380.

[26] Hughes v. Hartford F. Ins. Co., 17 Ill. 518.

[27] Elworth v. Lockwood, 42 N. Y. 97; Lamb v. Montague, 112 Mass. 353.

[28] Sheldon, Subrogation (2d Ed.), sec. 45; Staples v. Fox, 45 Mass. 680.

[29] Sheldon Subrogation, Preface to 1st Ed.

converse of it.[30] It is a fundamental principle that subrogation is the substitution of an inferior to the rights of a superior and not a superior to the rights of an inferior.[31] I shall, therefore, refrain from any further reference to such rights of the creditor in this paper.

This right of subrogation is superior to any other claim or lien upon the property, provided such other claim or lien was subject to the debt that has been discharged.[32] But it will not be carried further than to compensate the party for the amount actually paid under a legal liability, or under compulsion.[33]

§ 2. *Subrogation in Cases of Suretyship.*—The equity of subrogation is most frequently applied in the case of sureties; but it may be stated as a general proposition that this right will accrue to all parties who are liable in common to a debt or charge of any kind.[34] And since the courts are pretty generally agreed as to when and under what circumstances a surety as such may take advantage of this right, it will be sufficient at this instance to state briefly its application in general to sureties, referring to it as the necessity of the case may require under the subsequent headings where its application is more complicated.[35]

A surety who has paid the debt of his principal is entitled to be subrogated to all the securities, liens and equities, which the creditor holds as a means of enforcing payment from the principal debtor.[36] And this right will be transmitted to his heirs if necessary for their protection; also to the surety's assignees, grantees, and creditors, when the principal demand had been used in such a way as to destroy their subordinate liens or claims upon the debtor's property.[37]

The creditor must do nothing to prejudice the surety's right of subrogation.[38] If he parts with any property held by him from the principal debtor as a security for the debt, or does any other affirmative act by reason of which the surety cannot be substituted to the rights and securities of the creditor, the surety will be discharged at least *pro tanto* from his liability.[39]

It is almost impossible to put the surety's right of subrogation too high. But he cannot be substituted to greater rights than the creditor himself enjoyed.[40] Nor is he entitled to this equity until he has paid the debt for which he is bound as surety.[41] Even though he is liable for only a part of the debt, he cannot enforce the right, upon payment of that part until the creditor's demand is fully satisfied.[42] In equity the surety is regarded as a creditor of his principal and with all the privileges of a creditor[43] from the time he signs the instrument by which he is bound,[44] though his right to sue his principal[45] and to be substituted to the securites held by the creditor does not become consummated until he has paid the debt.[46]

Although it is a generally accepted rule that in equity a surety will be subrogated, upon payment of the principal's debt, to the benefit of all the securities which the creditor holds against the principal for the payment of the debt, yet, it was finally settled in England that this right of subrogation must be confined to only those securities which continue to exist, and that the debt itself is *ipso facto* extinguished by the act of payment, and, therefore, cannot pass to the benefit of the surety.[47] But this rule was changed by the "Mercantile Law Amendment Act"[48] which provides that any person who pays another's debt, whether under compulsion, or for the protection of his own interests, may sue the principal obligor upon the *debt* as well as enforce collateral securities for the same.

[30] Sheldon, Subrogation, Introduction, VII. Maure v. Harrison, 1 Eq. Ab. 93; *In re* Walker (1892), 1 Ch. 621.

[31] See any definition of Subrogation; Shinn v. Budd, 14 N. J. Eq. 234; Hayes v. Ward, 4 Johns. Ch. 130; Swan v. Patterson, 7 Md. 164.

[32] Duncan v. Drury, 9 Pa. St. 332.

[33] Teamsters v. Withrow, 9 W. Va. 296; Hicka v. Bailey, 229; Coggeshall v. Ruggles, 66 Ill. 401; Pease v. Eagan, 131 N. Y. 262; Greiner v. Greiner, 58 Cal. 115.

[34] Bispham's Prin. Eq. sec. 328; Fulton's Appeal, 95 Pa. 321.

[35] See Articles IV., V., VI. this paper.

[36] Union Trust Co. v. Morrison, 125 U. S. 591; Keokuk v. Love, 51 Iowa, 119; Talbot v. Wilkins, 31 Ark. 411; Foelds v. Sherril, 18 Kan. 365; Tuck v. Calbert, 33 Md. 209; Allison v. Sutherlin, 50 Mo. 274; Dick v. Moon, 26 Minn. 309; Dozier v. Lewis, 27 Miss. 679.

[37] Holt v. Bodey, 18 Pa. St. 207; Meador v. Meador, 88 Ky. 217; Wilson v. Murray, 90 Ind. 477; Beaver v. Slanker, 94 Ill. 175; Watts v. Kinney, 3 Leigh (Va.), 272.

[38] Pearl v. Deacon, 24 Beav. 186.

[39] Kirkpatrick v. Hawk, 80 Ill. 122; Guild v. Butler, 127 Mass. 386; Hurd v. Spencer, 49 Vt. 581; Jenkins v. McNeese, 34 Tex. 189; Winston v. Yeargin, 50 Ala. 340; Saline County v. Bute, 65 Mo. 63; Hill v. Voorhies, 22 Pa. St. 68; Kinnaird v. Webster, 10 Ch. Div. 139; City Bank v. Young, 43 N. H. 457.

[40] Barton v. Brent, 87 Va. 385; Perkins v. Nolson, 75 Ga. 295; Benneson v. Savage, 130 Ill. 352; Wynne v. Willis, 76 Tex. 589; Schur v. Schwartz, 140 Pa. St. 53.

[41] Kemmerrer's Appeal, 125 Pa. St. 238; Church, Petitioner, 16 R. I. 231; McConnell v. Beattie, 34 Ark. 113; Cowell v. McCowan, 53 Ill. 363.

[42] Rice v. Morris, 82 Ind. 204; Cooper v. Jenkins, 32 Beav. 337; Bridges v. Nicholson, 20 Ga. 90; Field v. Hamilton, 45 Vt. 35; Vest v. Vass, 74 Ind. 566.

[43] Lane v. Spiller, 18 N. H. 209; Brogg v. Patterson, 85 Ala. 233; McKee v. Scobee, 90 Ky 124.

[44] Walker v. Dicks, 80 N. Car. 263; Davis v. McCurdy, 50 Wis. 569; Reitz v. People, 72 Ill. 435.

[45] Huse v. Ames, 104 Mo. 91; Adams v. Tator, 57 Hun (N. Y.), 302.

[46] Chateau v. James, 11 Ill. 300; Laughridge v. Bowland, 52 Miss. 546; Furnold v. Bank of State of Missouri, 44 Mo. 336.

[47] Armitage v. Baldwin, 5 Beav. 278; Jones v. Davis, 4 Russ. 227; Copis v. Middleton, Turn & Russ. 224.

[48] Mercantile Law Amendment Act, 19 & 20 Vic. 97, sec. 5.

With more or less aid from legislation, the rule as laid down by this statute has been very generally adopted in this country.[49] And though it is now conceded that the payment of the debt by the surety extinguishes the same as well as all the securities, so far as the creditor is concerned, yet, as to the surety, it is in the nature of a purchase by him from the creditor, and does not relieve the principal debtor;[50] it operates in equity as an assignment of both the debt and securities to the surety.[51] However, it is held in a few States, that the original obligation is discharged absolutely by its payment, and that one, other than the real debtor, who is liable therefor, will, upon paying the same, be subrogated only to the collateral securities for the payment of the debt.[52]

Two or more sureties for the same debt do not have equal rights against each other, unless their liability is the same in kind and degree.[53] Thus, one who becomes surety for the principal in the course of some legal proceeding against him, is not entitled to subrogation against prior sureties for the debt;[54] on the contrary, as to prior sureties, he holds the place of the debtor.[55]

Since the relation of co-sureties among themselves is the same as that of joint debtors, the reader is referred to section 3, which I have devoted to the subrogation of joint debtors.

§ 3. *Subrogation Among Joint Debtors.*—The authorities disagree as to the right of subrogation between parties severally bound as principals. Some courts hold that such right does not exist.[56] but it is more in accordance with the principles of natural justice to allow a joint debtor, upon payment of the obligation, to be subrogated to the common creditor's means of payment, that he may recover from his co-debtors their *pro rata* of the obligation which he has discharged; and this seems to be the general rule.[57] As between the joint debtors each one is regarded as the principal debtor for that part which he ought to pay, and as surety for his co-debtors as to that part of the debt which they should satisfy.[58]

I stated in a former section that when a surety pays his principal's debt it is not extinguished as between principal and surety, but is regarded as purchased by the surety. By the Mercantile Law Amendment Act, this right is extended to a joint debtor who has paid the common obligation.[59] But in this country the rule is not so well settled as to joint debtors. High authority may be found both in support[60] and in denial[61] of this doctrine. The prevailing rule seems to be that the payment of the common debt by one joint debtor does not, as between himself and his co-obligors, amount to a discharge of the debt, but that it is treated as purchased by the party making the payment.

Accordingly, where one of the owners of land which is subject to a mortgage pays the debt for the protection of his own estate, and takes an assignment of the mortgage, its lien remains alive as against the other owners.[62] And he will be subrogated to the rights of the mortgagee against the shares of the others to their ratable proportion of the incumbrance as if the mortgage subsisted, whether they be tenants in common or hold distinct parcels of the incumbered estate.[63] The same rule applies where several different persons give securities on their individual property to secure the same debt.[64]

If a partnership has dissolved leaving a firm indebtedness, and one of its members discharge the same out of his private property, he may in

[49] Benne v. Schnecko, 100 Mo. 250; Miller v. O'Kain, 13 Hun (N. Y.), 594; Am. note to Dering v. Winchelsea, 1 Lead. Cas. Eq. 434: Townsend v. Whitney, 15 Hun (N. Y.). 93; Sheldon, Subrogation (2d. Ed). sec. 137 *et seq.*

[50] Bendey v. Townsend, 109 W. S. 665; Strong v. Blanchard, 4 Allen (Mass.). 538; Campbell v. Pape, 96 Mo. 468; Sublett v. McKinney, 19 Tex. 438; Sheldon, Subrogation, secs. 135, 136, 137.

[51] Hauser v. King, 76 Va. 731; Jones v. Tincher, 15 Ind. 308; McCormick v. Irwin, 35 Pa. St. 111; Sheldon, Subrogation, secs. 87, 137.

[52] Moore v. Campbell, 36 Vt. 361; Slode v. Mutrie, 156 Mass. 19; Whittier v. Hewinway, 22 Me. 238; Sheldon, Subrogation, sec. 138.

[53] Stout v. Fenno, 6 Allen (Mass.), 580; Schur v. Schwartz, 140 Pa. St. 53; Dillan v. Scofield, 11 Neb. 419.

[54] Hammock v. Baker, 3 Bush (Ky.), 208; Smith v. Bing, 3 Ohio, 33.

[55] Keller v. Williams, 10 Bush (Ky.), 216; Friber v. Donovan, 23 Ill. App. 58; Handy v. Henritze, 85 Va. 177; Bender v. George, 92 Pa. St. 36.

[56] Eagles v. Eagles, 4 Ark. 286; Clark v. Warren, 55 Ga. 575; Benton v. Bailey, 50 Vt. 137; Fessler v. Hickernell, 82 Pa. 150; Bispham's Prin. Eq. (6th Ed.) sec. 337

[57] Lamb v. Montague, 112 Mass. 352; Durpin v. Kuny, 19 Oreg. 71; Dobyns v. Rowley, 76 Va. 537; Summer v. Rhodes, 14 Conn. 135; Smith v. Latimer, 15 B. Mon. (Ky.) 75; Merwin on Eq. & Eq. Plead. sec. 629; Chase v. Woodbury, 6 Cush. 143; Pratt v. Law, 9 Cranch, 456; Sheldon, Subrogation, sec. 169.

[58] Newton v. Newton, 53 N. H. 537; Higman v. Harris, 108 Ind. 246; Moore v. State, 49 Ind. 558; Stering v. Stewart, 74 Pa. St. 445; Chipman v. Morril, 20 Cal. 130; Pratt v. Law, 9 Cranch, 456; Wheatley v. Calhoun, 12 Leigh (Va.), 264.

[59] Mercantile Law Amendment Act, 19 & 20 Vic. ch. 97, sec. 5.

[60] Sheldon, Subrogation, sec. 136 *et seq.*; O'Bryan v. Neel, 84 Ga. 134; Hendrickson v. Hutchison, 29 N. J. Law, 180; Hollinsworth v. Pearson, 53 Iowa, 53; Neilson v Fry, 16 Ohio St. 552.

[61] Stanley v. Nutter, 16 N. H. 22; Morley v. Stephens, 47 How (N. Y.) 228; Baykin v. First National Bank, 53 Ill. 57; Bispham's Prin. Eq., sec. 337.

[62] Duncan v. Drury, 9 Pa. St. 332.

[63] Newbold v. Smart, 67 Ala. 336; Carter v. Penn, 99 Ill. 390; Lowery v. Byers, 80 Ind. 433; Hubbard v. Ascutney Mill Dam Co., 20 Vt. 402; Aiken v. Gale, 37 N. H. 501.

[64] *In re* Wright, 16 Fed. Rep. 482; McCready v. Van Anthwerp, 24 Hun (N. Y.), 322; Doudy v. Blake, 50 Ark. 205; Aiken v. Gale, 37 N. H. 501; Beck v. Farrant, 61 Tex. 402.

equity enforce contribution from his co-partners.[65] This right springs from partnership agreement to contribute to losses rather than by means of subrogation;[66] for it is the settled doctrine, both in England and in this country, that firm creditors have no lien upon firm property,[67] and can procure it to the satisfaction of their claims only through the equities of the partners themselves to have firm property applied in the first instance to the payment of firm debts.[68] If, as between joint debtors, one becomes duty bound to pay the whole debt, and the others are compelled to pay it, they will be subrogated to the securities and other means of payment which the creditor holds against the former to the same extent as if they had been sureties of the former *eo nomine*.[69] But the debtors cannot lessen the rights of the creditor against all or any of them.[70] And even when the whole debt has been discharged, subrogation will not be allowed if the person seeking it has no meritorious claim, as where he is indebted to the party in a larger amount than that which he seeks, or where for value he has waived his right.[71]

§ 4. *Subrogation Among Parties to Bills and Notes.*—The payment of a bill or note by an indorser to the holder, whether voluntarily or under compulsion, will not extinguish the instrument, if the indorser was liable thereon; but he will be subrogated to all the available remedies upon the bill or note against prior parties thereto.[72] And a partial payment by an indorser will not, to the extent of the payment, lessen the liability of prior parties, unless made in their behalf;[73] but the holder may collect the full amount from those antecedently liable thereon, holding the amount of such partial payment in trust for the indorser who first made it.[74] On the other hand, a partial payment by any party to a bill or note inures to the benefit of all subsequent parties thereto, and is a discharge *pro tanto* of their liability.[75] Likewise, if separate judgments have been procured against maker and indorser, the latter may satisfy the judgment against himself, and by taking an assignment of the other judgment, enforce it against the maker for his own benefit;[76] and the indorser may be substituted to the benefit of a judgment against the maker, even though there has been no assignment thereof.[77] But the subrogation of the indorser is only to a suit or judgment against the maker on the *original* obligation; the indorser cannot enforce a merely incidental remedy.[78]

The indorser of a bill or note, or any one who has to the knowledge of the holder become an accommodation party for the primary debtor thereon, is to be regarded as a surety of the primary debtor and has all the rights of a surety.[79] But this right of the accommodation maker to the privilege of a surety against the holder depends upon the holder's knowledge of the true relation of the parties to the note.[80] Since the vendee is subrogated to all the rights of his vendor,[81] one who takes a note or bill from a *bona fide* holder, for value, will be subrogated to all the rights of such holder, though he himself takes it overdue, or knows of facts which would otherwise constitute a defense to the instrument in his hand.[82] As the acceptor of a bill, *supra*, protest is liable like an indorser,[83] he is subrogated, upon taking it up, to all the rights of an indorser against all parties prior to the one for whose honor he takes it up;[84] but such an acceptance will discharge all parties to the bill subsequent to the one for whose honor it has been accepted.[85] The indorsement or transfer of a bill will pass to the transferees the right to en-

[65] Downs v. Jackson, 33 Ill. 465.

[66] Phillips v. Blachford, 137 Mass. 510; Hagan v. Reynolds, 21 Ala. 56. *Contra:* Sells v. Hubbell, 2 Johns. Ch. (N. Y.) 394, 397.

[67] Allen v. Centre Valley Co., 21 Conn. 130; Sigley v. Knox County Bank, 8 Ohio St. 511; Bispham's Prin. Eq. (6th Ed.), sec. 515.

[68] Couchman v. Maupin, 78 Ky. 33; Schmidtopp v. Caurrier, 55 Miss. 597; Bispham's Prin. Eq. (6th Ed.), sec. 515.

[69] Schinn v. Schinn, 91 Ill. 477; Buenttel v. Harmount (Minn.), 49 N. W. Rep. 250; Hards v. Button, 79 Ill. 504; Jackson v. Roberts (Ga.), 9 S. E. Rep. 358; Buckhanan v. Clark (Va.), 10 Gratt. 164; Field v. Hamilton, 45 Vt. 35; Butler v. Birkley, 13 Ohio St. 514.

[70] Hards v. Burton, 79 Ill. 504; Buettel v. Harmount, 46 Minn. 481; Jackson v. Roberts, 83 Ga. 358.

[71] Greenlaw v. Petit, 87 Tenn. 468; Crawford v. Richeson, 101 Ill. 351; Forest Oil Co.'s Appeal, 118 Pa. St. 138; Greer v. Bush, 57 Miss. 575; Blake v. Traders' Bank, 149 Mass. 250; Drake v. Paige, 127 N. Y. 562; Ritter v. Cast, 99 Ind. 80.

[72] Woodward v. Pell, L. R. 4 Q. B. 55; Rushworth v. Moore, 36 N. H. 188; Beckwith v. Webber, 78 Mich. 390; Bird v. Louisiana Bank, 93 U. S. 96; Crawford v. Logan, 97 Ill. 396.

[73] Randall v. Moon, 12 C. B. 261; North Nat. Bank v. Hamlin, 125 Mass. 506.

[74] Madison Square Bank v. Pierce, 62 Hun (N. Y.), 493.

[75] Lowell v. French, 54 Vt. 193; Nash v. Ames, 8 Allen (Mass.), 318.

[76] Falson v. Carli, 5 Minn. 264.

[77] Ross v. Jones, 22 Wall. 576; Yated v. Mead, 68 Miss. 787; Old Dominion Bank v. Allen, 76 Va. 200.

[78] Dehn v. Heckman, 12 Ohio St. 181; Warren Bank v. Parker, 8 Gray (Mass.), 221.

[79] Story on Prom. Notes, sec. 412 *et seq.*; Gunnis v. Weigley, 114 Pa. St. 191; Hoffman v. Butler, 105 Ind. 371.

[80] Sheldon, Subrogation (2 Ed.), sec. 182a; Auburn Bank v. Marshall, 73 Me. 79; Goodman v. Litaker, 84 N. Car. 8.

[81] Chicago v. Tebbetts, 104 U. S. 655.

[82] Carruthers v. West, 11 Q. B. 143; Scotland County v. Hill, 132 U. S. 107; Suffolk Sav. Bank v. Boston, 149 Mass. 364; Sanoma Bank v. Gove, 63 Cal. 355; Kast v. Bender, 25 Mich. 515.

[83] Hoare v. Cazenove, 16 East, 391; Schofield v. Bayard, 3 Wend. (N. Y.) 488.

[84] Beckwith v. Webber, 78 Mich. 390; Bushworth v. Moore, 36 N. H. 188.

[85] *Ex parte* Wackeroth. 5 Ves. 574; Sheldon, Subrogation (2d Ed.), sec. 184.

force securities given for the payment of the same, even though the securities have been formally assigned or delivered.[86] The indorsement and delivery of such instrument operates as an equitable assignment of all securities for its payment, and the holder of the legal title of the securities will be regarded as a trustee for the benefit of the transferees.[87] A security given by the maker of a note to his accommodation indorser thereon to secure him against his liability is merely a personal indemnity and not an accessory to the principal obligation; and as a general rule it can be reached only upon payment by the indorser.[88] A surety who has been forced to pay the note, cannot avail himself of such an indemnity because the maker, though he be a surety, and an accommodation indorser, are not co-sureties.[89]

Where a bill is drawn against a consignment of merchandise and is accompanied with a warehouse receipt for the same, and a certificate by which the drawer declares a lien upon the merchandise in favor of the holder of the bill, and makes the consignee a trustee of the merchandise for the holder of the bill the indorsee acquires by taking the bill a special property in the merchandise, and may enforce the trust against the consignee, or against one to whom the consignee has pledged the property after accepting the bill.[90] So an indorsee of a bill accompanied with a shipping document acquires a special property in the goods described therein,[91] and the shipper loses the possession and the title of the property. On the other hand, the holder of a bill, though it be accompanied by the shipper's document, will not have a lien upon the goods, if the acceptor by means of his acceptance acquired against the drawer the full control of the property, or if the carrier had been made the agent of the purchaser, upon whom the bill was drawn.[92] By analogy to the rule that the beneficiary of a promise may bring an action thereon, though he is not a party to the contract nor privy to the consideration, it has been sometimes held that the holder of a check is substituted to the rights of the drawer, the depositor, and may sue the bank in his own name, upon its failure to pay the check.[93] But by the great weight of authority no one but the depositor may maintain such an action,[94] unless the check was drawn upon such property as in equity belongs to the payee.[95]

§ 5. *Subrogation in the Administration of Estates.* —An executor or administrator may elect to pay debts of the estate out of his own pocket and reimburse himself from the personal assets in his hands; and by so doing the assets become, to the actual value of his payments, his own property.[96] And though an executor cannot retain to himself land which he has been ordered to sell, yet, where the personal assets are insufficient, he may, upon payment out of his own property of debts of the estate to the value of the land, reimburse himself out of the proceeds of the sale of the land;[97] and his right to be reimbursed under such circumstances is superior to the claims of distributees.[98] Though an administrator who pays unpreferred debts of his intestate before he is legally bound to pay them cannot, if the estate afterward proves to be insolvent, charge it with the whole amount so paid by him, yet, there being no statutory regulations, he may be subrogated to the rights of the creditors, whose demand he has satisfied, against those assets to which they would have been entitled.[99] So if he has voluntarily paid the debts of a legatee out of the assets of an estate, though before the probate of the will, he may be subrogated to the rights of the legatee in the estate for his exoneration.[100] And since an executor is not responsible at common law for his co-executor's waste, provided he took no part in it and was guilty of no negligence,[101] he may, if compelled to replace a sum paid by his colleague out of the personal assets to the payment of debts properly chargeable upon real estate, hold such real estate in the hands of the heirs for his reimbursement.[102]

In order that a personal representative may

[86] McQuie v. Peay, 58 Mo. 56; Union Ins. Co. v Slee, 123 Ill. 57; Blake v. Williams, 36 N. H. 39; Creaner v. Creaner, 36 Ark. 91; Exchange Bank v. Stone, 80 Ky. 109.

[87] Converse v. Michigan Dairy Co., 45 Fed. Rep. 18; Patterson v. Booth, 103 Mo. 402; Hagerman v. Sutton, 91 Mo. 519; Burhans v. Hutcheson, 25 Kan. 625; Holway v. Gilman, 81 Me. 185.

[88] O'Hara v. Baum, 88 Pa. St. 114; Hartford Transp. Co. v. Hartford Bank, 46 Conn. 569.

[89] Nurre v. Chittenden, 56 Ind. 462.

[90] Michigan Bank v. Gardner, 15 Gray (Mass.), 362; Marine Bank v. Wright, 48 N. Y. 1.

[91] Dows v. Exchange Bank, 91 U. S. 618; Taylor v. Turner, 87 Ill. 296; Hathaway v. Hayes, 124 Mass. 311; Batavia Bank v. Ege, 109 N. Y. 120.

[92] Trust Nat. Bank v. Crabtree, 52 N. W. Rep. 559.

[93] Union Bank v. Ocean Bank, 80 Ill. 212; Roberts v. Austin, 26 Iowa, 315.

[94] First Nat. Bank v. Whitman, 94 U. S. 343; Carr v. Security Bank, 107 Mass. 45; Maginn v. Dollar Sav. Bank, 131 Pa. St. 362.

[95] Hemphill v. Yerkes, 132 Pa. St. 545.

[96] Livingston v. Newkirk, 3 Johns. Ch. (N. Y.) 312; Hancock v. Minat, 8 Pick. (Mass.) 29, 37, 38; Powell v. Powell, 80 Ala. 11; Sorrels v. Trantham, 48 Ark. 328.

[97] Livingston v. Newkirk, 3 Johns. Ch. (N. Y.) 312; Turner v. Shuffler, 108 N. Car. 642; Clayton v. Somers 27 N. J. Eq. 230.

[98] Terrell v. Rowland, 86 Ky. 67; Goodbody v. Goodbody, 95 Ill. 456; Black v. Black, 42 Iowa, 694; Gaw v. Huffman, 12 Gratt. (Va.) 628.

[99] Wooley v. Pemberton, 41 N. J. Eq. 394; Millard v. Harris, 119 Ill. 185; Breckenridge's Appeal, 137 Pa. St. 81; Byrd v. Jones, 84 Ala. 336.

[100] Pinkham v. Grant, 78 Me. 158; Stayner v. Bower, 42 Ohio St. 314; Stetson v. Moulton, 140 Mass. 597; Dickie v. Dickie, 80 Ala. 57.

[101] Adair v. Brimmer, 74 N. Y. 539; Smith v. Pettingrew, 34 N. J. Eq. 216.

[102] McKinn v. Aulbach, 130 Mass. 411; Walker v.

be subrogated to the rights of a creditor whom he has satisfied, his claim must be seasonably made.[103] If in the course of his administration he has disregarded the rights of preferred creditors in his payment of the debts of the estate, he will have, upon a deficiency of assets, no right of priority for his reimbursement.[104] And if certain property is charged by the will for the payment of debts, he must show that the charge has been faithfully administered and that such property was inadequate, before he can have a lien upon the testator's other property for his exoneration.[105]

Where one in good faith purchases real estate of a deceased party at an invalid sale made by the personal representative thereof for the payment of debts, he may by avoiding the sale be subrogated for his protection to the rights of those whom he has satisfied and to charge upon the land to the extent which the land was liable for the debts paid out of his purchase money.[106] The same rule applies to the purchaser of personal property from a guardian.[107] And if one estate is charged in a will with the payment of legacies and another with the payment of the testator's debts, and the legacies are paid out of the latter estate, the creditors are entitled to be subrogated to the rights of the legatees against the former estate in the hands of a purchaser thereof with constructive notice of the nature of the will.[108]

A tenant for life and remainder-man under a devise must each contribute in proportion to his interests in the land so devised to the extinguishment of their testator's debts for which the land is liable; and any payment by one for that purpose gives him a lien upon the estate as against the other.[109] The one cannot claim any benefit of the redemption by the other until he has contributed his proportion of the expense.[110] Where the personal property of a testator has been exhausted by the executor in the payment of debts chargeable upon both the real and personal estate, a legatee is entitled to receive so much of his legacy out of the estate descending to the heirs, as the personal estate, but for the creditors, would have paid, unless the will shows that the testator intended there should be no legacy in case of a deficiency in the personal property.[111]

Legatees who have paid the claim of a creditor of the estate will be substituted to the remedies of their creditor for their reimbursement, if the creditor's claim has been reduced to a judgment, or otherwise made a lien upon that portion of the testator's estate to which the legatees are entitled to look.[112] It would be otherwise if there had been no charge upon the assets out of which they could claim their legacies.[113] So if the administrator has exhausted money of the husband's estate which should have been paid to the widow for her dower interest, she will be subrogated to the rights of such creditor to hold the real estate for her reimbursement.[114]

A devisee of a tract of land is entitled, after discharging an incumbrance created upon the land by the testator, to be subrogated to the rights of the creditor against the personal estate;[115] and this right is extended against personal property subsequently discovered and received by the executors;[116] for it is the right of such devisee, unless the will clearly shows a contrary intention.[117] to have the testator's debts discharged out of the undisposed of assets of the estate.[118] But this rule is reversed if the devised property is charged with the debt of one other than the testator.[119] As specific legatees have the right to receive their legacies exonerated from incumbrances created by the testator,[120] they have upon the sale of their legacies for the payment of the testator's debts, the right to proceed against the general fund for their indemnity.[121] It may be stated as a general rule that where property devised to one of several devisees has been taken to pay the debts of the testator, he will be entitled to contribution for his loss against the other devisees in proportion to the value of their respective interests,[122] and this right accrues to an heir or legatee against the other heirs or legatees respectively.[123]

Walker, 88 Ky. 615; Nanz v. Oakley, 120 N. Y. 84; Fisher v. Skillman, 18 N. J. Eq. 229.

[103] *Ex parte* Allen, 15 Mass. 58; Loomiss' Appeal, 29 Pa. St. 237; Donnell v. Coke, 63 N. Car. 227.

[104] Findlay v. Trigg, 83 Va. 539; Evans v. Halleck, 83 Mo. 376.

[105] Frary v. Booth, 37 Vt. 78, 93.

[106] Kinney v. Knoebel, 51 Ill. 112; Folts v. Ferguson, 77 Tex. 301; Duncan v. Gainey, 108 Ind. 579; Cunningham v. Anderson, 107 Mo. 371; Neel v. Carson, 47 Ark. 421.

[107] Harrison v. Iliger, 74 Tex. 86.

[108] Burwell v. Fauber, 21 Gratt. (Va.) 446.

[109] Whitney v. Salter, 36 Minn. 103; Amory v. Lowell, 1 Allen (Mass.), 504; Durham v. Rhodes, 23 Md. 233.

[110] Ohner v. Boyer, 89 Ala. 273; Allen v. DeGroodt, 105 Mo. 442.

[111] Mollam v. Griffith, 3 Paige (N. Y.), 402; Allen v. Allen, 3 Wall. Jr. 289; Smith v. Wycoff, 11 Paige (N. Y.), 49; Lilford v. Keck, L. R. 1 Eq. 347.

[112] Place v. Oldham, 10 B. Mon. (Ky.) 400.

[113] See Article VII. this paper.

[114] Crouch v. Edwards, 52 Ark. 499.

[115] Redmond v. Burroughs, 63 N. Car. 242; Brandt's Will, 40 Mo. 266.

[116] Couch v. Delaplaine, 2 N. Y. 397.

[117] Brandt's Will, 40 Mo. 266; Rogers v. Rogers, 1 Paige (N.Y.), 188.

[118] Adams v. Brackett, 5 Met. (Mass.) 280; Keene v. Murin, 16 N. J. Eq. 398; Lenig's Estate, 52 Pa. St. 135.

[119] Gould v. Winthrop, 5 R I. 319; Andrews v. Bishop, 5 Allen (Mass.), 490.

[120] Richardson v. Hall, 124 Mass. 228; Johnson v. Goss, 128 Mass. 433.

[121] Hope v. Wilkinson, 14 Lea (Tenn.), 21; Crammer v. McSwords, 24 W. Va. 594.

[122] Harris v. White, 5 N. J. Law, 484; Brigham v. Cheever, 10 Mass. 450; Gallagher v. Redmond, 64 Tex. 622.

[123] Choplin v. Sullivan, 128 Ind. 50; Taylor v. Tay-

So where the legatees and devisees have been put upon an equality, their liability to contribute among themselves is equal.[124] But a residuary devisee is not entitled in this country to contribution from the other devisees.[125] So where a part of the deceased's land is primarily charged with his debts, the devisee or heir of this property cannot, upon its being taken for the payment of the debts, claim contribution therefor from the specific devisees or legatees, nor indemnity from the personal estate of the deceased.[126]

Beneficiaries under a will who have been deprived of property which they should have received, but for the election of another legatee, are entitled to compensation out of what the latter would have taken under the will by a different election.[127] Thus if a legatee under a will which puts him to an election by devising away property belonging to him, elects to waive the legacy and retain his own property, the subject-matter of the legacy will go to relieve the disappointed devisee, so far as is necessary to cover his loss.[128] But this doctrine does not apply where one person disappoints another by electing to take under the instrument which makes election possible.[129] The substitution of the beneficiaries who have been disappointed by the election of a devisee or legatee under the will, will, if necessary, be to the extent of the rights given by the will to the party making the election, but it can go no further.[130] It is generally held that where property is devised to one upon a condition merely, and he fails to comply with the same, thereby waiving his right to the devise, a stranger cannot, by performance of this condition, be substituted to the rights of the devisee.[131]

§ 6. *Where Different Parties Hold Successive Claims Upon the Same Property.*—Some effort has been made in a few courts to distinguish between a judgment or attachment lien and other incumbrances upon property. But by the great weight of authority it has the same effect as any other incumbrance upon the rights of subsequent holders of parts of the incumbered property.[132] Any person may disengage property from an incumbrance by payment of the debt which creates it, if such incumbrance prejudices an interest which he has in the property.[133] And such person will be subrogated, upon its payment, to the rights of the creditor against the debtor who is ultimately liable therefor,[134] as well as against the property upon which the debt is a charge.[135] This right of the party who has the subordinate interest, cannot be defeated by any act of the party holding the prior incumbrance, provided the latter's debts and costs are paid in full;[136] and his right to reimburse out of the incumbered property is superior to that of intervening incumbrances;[137] nor will an assignment of the evidence of the incumbrance be necessary for this purpose.[138] Thus, one who has a title in land which might be defeated by the foreclosure of a mortgage upon the land, may pay the money due upon the mortgage and hold the land until some one who has a right to redeem has indemnified him.[139] And though the mortgage was formally discharged it may, for his benefit, be considered as still subsisting to the extent of his right against the property.[140] If, however, a purchaser from a mortgagor pays off the mortgage and has it discharged without more, he will not be subrogated to the rights of the mortgagee against an incumbrancer whose lien is subject to the mortgage, but prior to the purchase.[141] But where the purchaser pays the mortgage debt without the knowledge of a subsequent lien he may claim subrogation to the lien of the prior mortgage in spite of its discharge.[142] Where one purchases property under a valid decree in favor of creditors, he will be subrogated to the rights of those creditors,[143] and since the

lor, 8 B. Mon. (Ky.) 419; Brinson v. Cunliff, 25 Tex. 760; McCampbell v. McCampbell, 5 Litt. (Ky.) 92.

[124] Grim's Appeal, 89 Pa. St. 333; Brandt's Will, 40 Mo. 266; Dugan v. Hollins, 11 Md. 41.

[125] Richardson v. Hall, 124 Mass. 228, 233.

[126] Fairman v. Heath, 19 Ind. 63; Graves v. Graves, 106 Ind. 118; Hacker's Appeal, 4 Pa. St. 497.

[127] Pickersgill v. Rodger, 5 Ch. Div. 163; Jennings v. Jennings, 21 Ohio St. 56; Sarles v. Sarles, 19 Abbott, New Cas. (N. Y.) 322.

[128] Gilman v. Gilman 111 N. Y. 265; McNett v. McNett, 24 N. J. Eq. 277; Batone's Estate, 136 Pa. St. 307; Kinnard v. Williams, 8 Leigh (Va.), 400.

[129] *In re* Chesman, 31 Ch. D. 466.

[130] Rodgers v. Jones, 3 Ch. Div. 688; Upham v. Emerson, 119 Mass. 509; Sandoe's Appeal, 65 Pa. St. 314.

[131] Temple v. Nelson, Met. (Mass.) 584; Holstead v. Westervelt, 41 N. J. Eq. 100; Savage v. McCorkle, 17 Oreg. 42; Rugbee v. Sargent, 23 Me. 269. *Contra:* Ferre v. American Board, 53 Vt. 162; McArthur v. Gordon, 126 N. Y. 597.

[132] National Sav. Bank v. Cresswell, 100 U. S. 63; Barnes v. Mott, 64 N. Y. 397; Ebbenhardt's Appeal, 8 Watts & Serg. (Pa.) 327; Edwards v. Appleton, 70 Ind. 325.

[133] Powers v. Golden Lumber Co., 43 Mich. 468; Scott v. Henry, 13 Ark. 112; Morse v. Smith, 83 Ill. 397.

[134] Southworth v. Schofield, 51 N. Y. 512.

[135] Darst v. Bates, 95 Ill. 493; White v. Hampton, 13 Iowa, 259.

[136] Emigrant Savings Bank v. Clute, 33 Hun (N. Y.), 82; Brigelow v. Cassedy, 26 N. J. Eq. 557.

[137] Conn. Ins. Co. v. Bulbe, 45 Mich. 113; Erwin v. Acker, 126 Ind. 133; Dillin v. Kauffman, 58 Tex. 696.

[138] Reyburn v. Mitchell, 106 Mo. 367; Moore v. Beasom, 44 N. H. 215.

[139] Twombly v. Cassidy, 82 N. Y. 155; Taylor v. Heggie, 83 N. Car. 244; Manwaring v. Powell, 40 Mich. 371.

[140] Lewis v. Chittick, 25 Fed. Rep. 176; Schissell v. Dickson, 129 Ind. 139; Lamb v. Richards, 43 Ill. 312.

[141] Bentley v. Whittemore, 18 N. J. Eq. 366; Carter v. Goodin, 3 Ohio St. 75.

[142] Barnes v. Mott, 64 N. Y. 397; Young v. Morgan, 8 Ill. 199.

[143] Watking v. Winnings, 102 Ind. 330; Jones v. Smith, 55 Tex. 383; Raymond v. Holborn, 23 Wis. 57.

creditors would not be bound by a lien of which they had no notice, the purchaser would not be affected by such a lien even though he had notice of its existence before the purchase.[144] And a purchaser at a sale made to enforce a lien will be substituted to the rights of the original lienholder though the proceedings were invalid.[145] If the purchase does not put a legal title in him, it will be treated as an equitable assignment of the mortgage to him.[146] The right of the purchaser of property to be subrogated for his payment in discharge of a valid lien does not depend upon the validity of his title under the purchase.[147] It is sufficient if, by his payment in good faith, he discharged a real burden upon the property for the protection of an interest which he thinks to be in himself.[148] But the purchaser's right of subrogation to the benefit of debts which have been paid out of his money, is limited to his reimbursement for the payment of debts which stood as a *prior* charge upon the property purchased by him.[149]

Where one creditor holds a prior security upon two funds or estates, against either of which he may resort for the satisfaction of his demand, and another creditor holds a junior security upon one of these funds, the former creditor may be compelled in a court of equity to exhaust the fund which he alone can hold before resorting to the other fund, thus depriving the other creditor of his security.[150] Should the prior creditor in the exercise of his legal right exhaust the only fund which the junior creditor can hold, the latter will be subrogated in a court of equity to the lien of the former upon the other fund, or to such portion thereof as is left after full satisfaction of the prior lien of which the senior creditor should have availed himself.[151] The junior creditor may also satisfy the senior creditor's lien by payment thereof and be subrogated to the rights of the prior creditor against both funds.[152] A court of equity will not compel the prior creditor to confine himself to one fund only, unless that fund is shown to be sufficient to satisfy his demand;[153] nor can the junior creditor insist that the funds shall be marshalled in any case where it would injuriously affect the rights of the prior creditor,[154] or rights that are vested in third parties,[155] nor will it be applied against the prerogative right of the government to hold all of its debtor's property.[156] The junior creditor can claim the right to be subrogated to the position of the senior creditor only when they have the same common debtor,[157] and only when the prior claimant's demand is so satisfied as to free him from all further trouble, risk and expense.[158]

Where certain property is burdened with a mortgage, judgment-lien, or other incumbrance, and parcels of it are sold successively to different purchasers with warranty, whether by the original incumbrancer, or by his grantee, it is almost universally accepted that that portion of the property retained by the debtor should be applied first to the discharge of the incumbrance,[159] and if that be insufficient, the parcels sold shall be resorted to in the inverse order of their alienation.[160] It is an equitable right of each purchaser to have the payment of the debt cast upon the remaining property.[161] But this rule does not apply to cases where the different parcels of the incumbered property have been successively conveyed to the same person;[162] nor in any case where it would work an injustice to the creditor;[163] nor where the request for its application has been made after the foreclosure is completed.[164] The rule adopted in Iowa and Kentucky on this subject is rather anomalous. Though it is held in those states that the portion which remains unsold should be first proceeded against,[165] yet, as between the successive grantees of different parcels of the incumbered property,

[144] Sharp v. Shea, 32 N. J. Eq. 65; Martin v. Jackson, 27 Pa. St. 504.

[145] Brabst v. Brock, 10 Wall. 519; Russell v. Hudson, 28 Kan. 99; King v. Brown, 80 Tex. 276.

[146] Smith v. Robertson, 89 N. Y. 555; Wells v. Lincoln County, 80 Mo. 424; Wilson v. White, 84 Cal. 239.

[147] Fowler v. Parsons, 143 Mass. 401; Gerdins v. Menage, 41 Minn. 417.

[148] Guckian v. Riley, 135 Mass. 71; Moisier's Appeal, 56 Pa. St. 76; Wadsworth v. Blake, 43 Minn. 509; Harlan v. Jones, 104 Ind 167; Kelley v. Duff, 61 N. H. 435; Arn v. Hoppin, 25 Kan. 707.

[149] Carpenter v. Brenham, 40 Cal. 221; Comstock v. Michael, 17 Neb. 288.

[150] Bird v. Jackson, 98 Ill. 78; Swift v. Canbay, 12 Iowa, 444; Sternberg v. Valentine, 6 Mo. App. 176; Davenport Plow Co. v. Mewis, 10 Neb. 317; Reynolds v. Tooker, 18 Wend. (N. Y.) 591; Lloyd v. Galbraith, 32 Pa. St. 103.

[151] Slade v. Van Vechten, 11 Paige (N. Y.), 21; Wolf v. Ferguson, 129 Pa. St. 272; Bank of Kentucky v. Vance, 4 Litt. (Ky.) 168.

[152] Washburn v. Hammond, 151 Mass. 132.

[153] Mason's Appeal, 89 Pa. St. 402; Barnwell v. Wafford, 67 Ga. 50.

[154] Woolcocks v. Hart, 1 Paige (N. Y.), 185; Thayer v. Daniels, 113 Mass. 129; Wolf v. Smith, 36 Iowa, 454; Cannon v. Kreip, 14 Kan. 324; Sweet v. Redhead, 76 Ill. 374.

[155] Lloyd v. Galbraith, 32 Pa. St. 103; Sager v. Tupper, 35 Mich. 134; Green v. Ramage, 18 Ohio, 428.

[156] United States v. Duncan, 4 McClain, C. C. 607.

[157] Boone v. Clark, 129 Ill. 466; Saunders v. Cook, 22 Ind. 436; Gegner v. Warfield, 72 Iowa, 11.

[158] Graff's Estate, 138 Pa. St. 69; Swigert v. Bank of Kentucky, 17 B. Mon. (Ky.) 268.

[159] Savings Bank v. Cresswell, 100 U. S. 630; Edwards v. Applegate, 70 Ind. 325; Gantz v. Toles, 40 Mich. 725; Raun v. Reynold, 11 Cal. 14.

[160] Holden v. Pike, 24 Me. 225; Braun v. Simmons, 44 N. H. 475; Burton v. Baker, 23 Mich. 312.

[161] Beard v. Fitzgerald, 105 Mass. 134; Hohn v. Beheman, 73 Ind. 120; Niles v. Harmon, 80 Ill. 396.

[162] Steere v. Childs, 15 Hun (N. Y.), 511.

[163] Pancoast v. Duval, 26 N. J. Eq. 445; Francis v. Herren, 101 N. Car. 497.

[164] St. Joseph Manufacturing Co. v. Doggett, 84 Ill. 556.

[165] Mickley v. Tomlinson, 79 Iowa, 298; Dickey v. Thompson, 8 B. Mon. (Ky.) 261.

there is no greater moral obligation upon the one than the other to pay the debt; and, therefore they must contribute ratably to the discharge of the incumbrance.

§ 7. *Subrogation Under Contracts of Insurance.*—Contracts of marine and fire insurance are contracts only to indemnify the insured for losses incurred by the happening of the event against which he is insured.[167] Hence, if the happening of the event causes no loss, no insurance can be collected.[168] On the contrary, a life insurance policy is not a contract of indemnity, but is an agreement in consideration of a fixed annuity to pay a specific sum of money upon the death of the party whose life is insured.[169] Upon the legal abandonment of the property by the insured, marine insurers, having satisfied their policy, acquire all the title, interest and burdens which the insured had in the same, with the *spes recuperandi*, and all his rights and remedies with respect thereto, and may enforce all subsequent rights in their own name.[170] Indeed, they may bring libel into a court of admiralty to enforce their rights before actual payment.[171] And it has been held that these rights will accrue to them upon satisfying the whole loss, though there has been no abandonment.[172] Upon satisfying the whole loss, the insurers will be subrogated to the rights of the insured against third persons whose negligence or wrongful acts have caused the loss.[173] And if after recovering judgment against the insurers, the insured destroys his remedy against a wrongdoer who has caused the loss, a court of equity will relieve the insurers *pro tanto* from the judgment against them.[174] If the policy be a valid one, since the valuation of the ship is conclusive as between the insurers and the insured, the insurers, upon paying this value, will be entitled to all damages recovered by the insured against the wrongdoer, though in fact the insured vessel was worth more than the valuation named in the policy.[175]

As between the carrier and the insurer of goods the carrier is primarily liable for his breach of contract or non-performance that results in damage or destruction of the goods, while the insurer's liability is merely secondary.[176] The insurers, therefore, upon payment of the loss caused by the carrier's failure of duty, may use the name of the insured to obtain indemnity from the carrier.[177] There has been some effort to show that this doctrine does not apply in cases of fire insurance upon land, but Mr. Sheldon clearly points out the unsoundness of the argument.[178] "The carrier may, however, destroy the insurer's right by stipulating with the owner for the benefits of any insurance to be obtained by the owner against loss or damage to the goods for which the carrier would be liable."[179] Insurers of property against fire which has burned through the fault of another person, or corporation, will, upon full payment for the loss, be subrogated to the remedies of the insured against the wrongdoer.[180] Their action at law must be in the name of the insured;[181] but most of those states which have adopted the reformed codes of procedure permit them to maintain the suit in their own names.[182] By the civil law, as adopted in Canada, the right of the insurer to subrogation is more extensive than here stated. Though the insurers are liable for and pay only *part* of the damage done, they may be subrogated *pro tanto* to the rights of the insured against the wrongdoer who caused the loss, and may maintain the action in their own name.[183]

Where an insurance is procured upon the mortgaged property, the insurers do not become sureties for the debt, but are insurers of the property only, and therefore, do not acquire all the rights of sureties.[184] But these rights may be obtained

[167] Smith v. Scott, 4 Taunt. 126; Rayner v. Peaston, L. R. 18 Ch. D. 1.

[168] Caslellin v. Preston, L. R. 11 Q. B. D. 380.

[169] Dalby v. India London Life Assur. Co., 15 C. B. 365.

[170] Sun Ins. Co. v. Hall, 104 Mass. 507; United Ins. Co. v. Scott, 1 Johns. (N. Y.) 106; Traders' Ins. Co. v. Propeller Manistee, 5 Biss. C. C. 381.

[171] The Manistee, 7 Biss. C. C. 35; Rogers v. Hasock, 18 Wend. (N. Y.) 318.

[172] Halbrook v. United States, 21 Ct. of Claims, 434; Dufourcet v. Bishop, 18 Q. B. D. 373.

[173] Mercantile Ins. Co. v. Clark, 118 Mass. 288; North of England Ins. Association v. Armstrong, L. R. 5 Q. B. 224; Monticello v. Mollison, 17 How. 152.

[174] Atlantic Ins. Co. v. Sparrow, 5 Paige (N. Y.), 285; Phœnix Ins. Co. v. Parsons, 129 N. Y. 86.

[175] North of England Ins. Co. v. Armstrong, L. R. 5 Q. B. 244; Sheldon, Subrogation (2d Ed.), sec. 222; Yates v. White, 4 Bing. New Cas. 272; Mason v. Salisbury, 3 Dang. 61; The Potomac, 105 U. S. 630; Comegys v. Vassa, 1 Pet. 193.

[176] North America Ins. Co. v. St. Louis Ry. Co., 9 Fed. Rep. 811; Bradburn v. Great Western Ry. Co. L. R. 10 Exch. 1; Great Western Steam Co. v. Phœnix Ins. Co., 129 U. S. 397; Hall v. Nashville & Chatt. R. R. Co., 13 Wall. 367; Mobile Ry. Co. v. Jurey, 111 U. S. 584.

[177] Hall v. Nashville & Chatt. R. R. Co., 13 Wall 367.

[178] Sheldon, Subrogation (2d Ed.), sec. 229.

[179] Jackson Co. v. Raylston Ins. Co., 139 Mass. 508; Irman v. S. Car. Ry. Co., 129 U. S. 128; The Sydney, 27 Fed. Rep. 119; Platt v. Richmond R. Co., 108 N. Y. 358.

[180] Hart v. Western R. R. Co., 13 Met. (Mass.) 99; Lumberman's Ins. Co. v. K. C. & Ft. Scott Ry. Co., 149 Mo. 165; Mammoth Ins. Co. v. Hutchinson, 21 N. J. Eq. 107.

[181] London Assn. Co. v. Sansbury, 3 Dang. 245; Rockingham Ins. Co. v. Booher, 39 Me. 253.

[182] Marine Ins. Co. v. St. Louis Ry. Co., 41 Fed. Rep. 643; Lumberman's Ins. Co. v. K. C. & Ft. Scott Ry. Co. 149 Mo. 165.

[183] Sheldon, Subrogation (2d Ed.), sec. 232; Pathier on Assurance, p. 248; Quebec Ass. Co. v. St. Louis, 7 Moore, P. C. 286; Alauzel on Assurance, p. 384, sec. 477.

[184] Cone v. Niagara Ins. Co, 60 N. Y. 619; Hadley v. N. H. Ins. Co., 55 N. H. 110; Ins. Co. v. Stinton, 103 U. S. 25; International Trust Co. v. Boardman, 145 Mass. 158; Cassa Maritima v. Phœnix Ins. Co., 129 N. Y. 490.

by a stipulation in the policy, procured by the mortgagee in his own favor upon the mortgaged property, that in case of loss the insurer will, upon paying the whole debt and taking an assignment of the mortgage, be entitled to all the remedies of the mortgagee for the whole debt secured thereby.[185] And it is the prevailing rule that upon payment of the whole debt and taking an assignment of the mortgage, the insurers of the mortgaged property will acquire all the rights of the mortgagee under the mortgage, even although there was no such stipulation in the policy.[186] "But where the mortgagor has an interest in the policy, either by payment of premiums or by agreement with the mortgagee, then there will be no subrogation in favor of the insurers, for the latter take only such right as the insured can give."[187]

The doctrine of subrogation is not extended to life insurers.[188] Thus the insurers of life will not be substituted to the rights of the personal representatives against a railroad company whose negligence has caused the death of the insured.[189] The reason for this is said by some courts to rest upon the ground that the insurers are affected by the wrongful act only by their artificial contractual relation with the insured, and, therefore, their loss is too remote and indirect a consequence of the wrongful act to give cause for an action.[190] But since the right of subrogation does not depend upon privity of contract, and since it is not the object of life insurance to indemnify for a loss, the true ground seems to rest upon the fact that it was not contemplated by the parties that life insurers should be subrogated to the rights of the insured.[191]

§ 8. *Subrogation of Strangers.*—The doctrine of subrogation does not subsist in favor of a mere stranger or volunteer who has paid another's debt, in the absence of an assignment or agreement for subrogation, there being no legal obligation to pay, and it not being necessary to do so in order to protect his own property rights.[192] To permit one thoroughly cognizant of the facts to be at liberty to elect whether he shall or shall not be bound would be contrary to natural justice, and tend seriously to subvert the rules of social order. The doctrine was instituted into the law for the relief of those who are already bound and cannot choose but to satisfy their obligation.[193] But there is no authority for the principle that a person, having full knowledge of the facts and at liberty to make his own terms, may demand any security he might require. It is a settled rule that one cannot obtrude himself upon another as his surety; therefore, if a man officiously and without solicitation pays the debt of another it will be absolutely extinguished,[194] and such person will not be substituted to the right of the creditor.[195] This principle has been applied to one who was not a party to the original transaction, but has subsequently become a surety and has paid the debt.[196] The mere loaning of money to a debtor to be applied in the discharge of a lien upon his estate does not of itself subrogate the lender to the lien, even though that was the understanding of the parties,[197] unless the agreement was such as would amount to a conventional subrogation.[198] It sometimes becomes difficult to determine just who should be regarded as a mere volunteer. No fixed rule can be laid down. The question must be determined upon the merits of each case. Clearly a mere intermeddler is to be so regarded; so is one who obligingly discharges the debt of another.[199] However, one who is under a moral obligation to make a payment,[200] or may be compelled to do so, will not be regarded as a stranger if he discharges the indebtedness, but will have his remedy against the person ultimately liable therefor.[201]

There is some contravention between the courts as to whether one makes a payment under the mistaken belief that he has an interest is entitled to the right of subrogation. Some cases hold that the party must have a *real* interest before he can claim this right.[202] Others hold

[185] Foster v. Van Reed, 70 N. Y. 19; Dick v. Franklin Fire Ins. Co., 81 Mo. 103; Allen v. Watertown Ins. Co., 132 Mass. 480; Thornton v. Enterprise Ins. Co., 71 Pa. St. 234.

[186] Castelain v. Preston, 11 Q. B. D. 380; Pendleton v. Elliott, 67 Mich. 496; Baker v. Fire Ins. Co., 79 Cal. 34. *Contra:* Suffolk Ins. Co. v. Boyden, 9 Allen (Mass.), 123.

[187] Richards on Insurance, sec. 25; Louden v. Waddle, 98 Pa. St. 242.

[188] Harding v. Townshend, 43 Vt. 536; Mobile Ass. Co. v. Brame, 95 U. S. 580.

[189] Mobile Ins. Co. v. Brame, 95 U. S. 580; Conn. Ins. Co. v. N. Y. & N. H. Ry. Co., 25 Conn. 265.

[190] Conn. Ins. Co. v. N. H. & N. H. R. Co., 25 Conn. 265.

[191] Burnard v. Rodocanachi, 7 App. Cas. 330, 333; Dalby v. India Life Ins. Co., 15 C. B. 365; Godsall v. Bolders, 9 East, 72; Mobile Ins. Co. v. Brame, 95 U. S. 580.

[192] St. Francis Mill Co. v. Sugg, 83 Mo. 476; Clark v. Moore, 76 Va. 262; Sandford v. McLean, 3 Paige (N. Y.), 117; Shinn v. Budd, 14 N. J. Eq. 234.

[193] Godsden v. Brown, Speers Eq. (S. Car.) 37, 41; Kleimenn v. Gieselmann, 45 Mo. App. 497; Guy v. Du Uprey, 16 Cal. 195; Hough v. Ætna Ins. Co., 57 Ill. 318.

[194] Shinn v. Budd, 14 N. J. Eq. 234; Terry v. O'Neal, 71 Tex. 592; Maran v. Abbey, 63 Cal. 56.

[195] Homestead Co. v. Valley R. R. Co., 17 Wall. 153; Toughloy v. Chapin, 134 Mass. 82; Binford v. Adams, 104 Ind. 41; Norton v. Higleyman, 88 Mo. 621.

[196] Swan v. Patterson, 7 Md. 164.

[197] Price v. Courtney, 87 Mo. 387; Nash v. Taylor, 83 Ind. 347; Unger v. Luter, 32 Ohio St. 210.

[198] Baker v. Ward, 7 Bush (Ky.), 240; Murphree v. Countiss, 58 Miss. 712.

[199] Russell's Appeal, 59 Pa. 401; Milbourne v. Philips, 143 Ind. 93.

[200] Slock v. Kirk, 67 Pa. St. 380.

[201] The Jersey City, 43 Fed. Rep. 166; Heritage v. Paine, 2 Ch. Div. 594; Jaquers v. Hackney, 64 Ill. 87.

[202] Koehler v. Hughes, 148 N. Y. 507; Campbell v. Foster Home, 163 Pa. 606.

that a supposed interest is sufficient.[203] To use the language of a distinguished author: "Perhaps the doctrine may be stated that, as a general rule, a supposed interest is not sufficient to support a claim of subrogation, but that exceptions may exist where other equities intervene."

Conventional subrogation consists only by direct agreement, express or implied, made between the parties paying and either the debtor or creditor.[205] No formal assignment, however, is necesssary, if the agreement has been entered into.[206]

Where one claims under a conventional subrogation to the rights of the creditor, which amounts to an assignment of the debt and securities held for its payment,[207] he cannot also maintain an action on the distinct ground of the *payment* which he has made for such assignment.[208]

In the preceding section I defined conventional subrogation to be an express or implied agreement. This is the phrase generally used. By express agreement is meant a direct statement either written or oral. But an eminent author has clearly shown that an express agreement may be indicated just as forcibly by acts and doings of the parties as by their direct statements.[209] It is a cardinal principle of conventional subrogation, as the decisions will clearly show, that the minds of the parties must have actually come together,[210] and that this meeting of the minds must be indicated by a direct agreement expressed either in words or by acts. The word "implied," so often used in this connection, must be construed to mean an agreement which can be inferred *as a matter of fact* from the acts of the parties, but does not extend to those conclusions of law which a court declares regardless of the real intention of the parties.[211]

In Louisiana a third person paying the demand of a creditor cannot claim conventional subrogation to his rights and securities, except by express agreement in the prescribed form,[212] with the creditor,[213] and at the time of the payment.[214] Hence, in that State, a third party who advances money to a stranger to pay an indebtedness secured by a mortgage, having entered into an agreement with the debtor that he shall take an assignment of the mortgage, will not have such right of substitution, unless the creditor has also entered into the agreement at the same time and in the prescribed form.[215] And no fact showing an intention of the parties that the person making the payment shall be substituted to the creditor's rights, will affect this substitution, unless the intention has been actually executed by a conventional subrogation.[216]

§ 9. *Loss and Enforcement of the Right.*—It is a general rule that a person may waive any right or privilege given to him by the law. One entitled to subrogation may waive this right either by express statement[217] to that effect or by his act.[218] Where one who is seeking the application of the doctrine of subrogation to protect him against a loss which he has suffered because of his own negligence, his request will not be granted if it would be prejudicial to other innocent creditors or assignees of the debtor.[219] But the mere fact that the loss resulted from his own negligence will not deprive him of this right if its enforcement would not prejudice the rights of others not at fault.[220] Like other rights, the right of subrogation will be barred by the statutory period of limitation.[221] But the mere lapse of a shorter time would not, of itself, be a bar to the right,[222] though a protracted delay by a surety would be evidence of a waiver of his right.[223] The right accrues upon payment, and as to his principal the statute begins to run against him from that time.[224]

In the foregoing pages, repeated reference has been made to the mode of enforcing the right of subrogation under particular circumstances. Therefore, but little need to be said at this instance. The mode of procedure in

[203] Bailey v. Bailey, 41 S. Car. 337; Dutcher v. Habby, 86 Ga. 198; Everston v. The Central Bank, 33 Kan. 352.

[205] New Jersey Midland Ry. Co. v. Wortendyke, 27 N. J. Eq. 658; Tex. & St. Louis R. R. Co. v. McCoghey, 62 Tex. 621.

[206] Morrow v. U. S. Mortgage Co, 96 Ind. 21; Woods v. Ridley, 27 Miss. 120.

[207] Jack v. Harrison, 34 La. Ann. 736.

[208] Thompson v. Hudson, L. R. 2 Ch. 255; Byrne v. Hibernia Bank, 31 La. Ann. 81.

[209] Martin on Civ. Proced. at Com. Law, sec. 54. See also Keener, Quasi Cont., 222; Bliss, Code Pleading.

[210] New Jersey Midland Ry. Co. v. Wortendyke, 27 N. J. Eq. 658; Van Winkle v. Williams, N. J. Eq. 105; Bunn v. Ludsay, 95 Mo. 250; White v. Cannon, 125 Ill. 412; Ashton v. Clayton, 27 Kan. 626.

[211] Keener, Quasi Cont., 3-6.

[212] Virgin's Succession, 18 La. Ann. 42; Hoyle v. Cozabat, 25 La. Ann. 438; Sheldon, Subrogation (3d Ed.), sec. 250.

[213] Virgin's Succession, 18 La. Ann. 42; Hoyle v. Cazobat, 25 La. Ann. 438.

[214] Brice v. Watkins, 30 La. Ann., pt. I., 21; Durac v. Ferrori, 26 La. Ann. 114.

[215] Hoyle v. Cozabat, 25 La. Ann. 438.

[216] Harrison v. Bislands, 5 Rob. (La.) 204; Chambliss v. Miller, 15 La. Ann. 713.

[217] U. S. Bank v. Peters, 13 Pet. (U. S.) 123; Midland Banking Co. v. Chambers, L. R. 7 Eq. 179.

[218] Neff v. Miller, 8 Pa. St. 347; Maning v. Tuthill, 30 N. J. Eq. 29; Hubbell v. Carpenter, 5 N. Y. 173.

[219] Gordon v. English, 3 Lea (Tenn.), 634; Corner v. Welch, 51 Wis. 331; State v. Beal, 88 Ind. 106; Bussey v. Page, 13 Me. 459.

[220] Willcox v. Foster, 132 Mass. 320; Daniel v. Baxter, 1 Lea (Tenn.), 630.

[221] Kreider v. Isenbice, 123 Ind. 10; Bledso v. Nixon, 68 N. Car. 521; Simpson v. McPhail, 17 Ill. App. 499.

[222] Bird v. Louisiana Bank, 93 U. S. 96; Corner v. Howe, 35 Minn. 518; Robertson v. Mowell, 66 Md. 530.

[223] Noble v. Turner, 69 Md. 519.

[224] McDonald v. Magruder, 3 Pet. 470; Burton v. Rutherford, 49 Mo. 255; Junker v. Rush, 26 N. E. Rep. 499; Bennett v. Cook, 45 N. Y. 268.

the enforcement of this right is extremely simple. Originally the process was only a bill in equity.[225] But its principles have come to be applied in the courts of common law,[226] and the party seeking his reimbursement may generally elect which of the remedies he will pursue.[227] In the case of marine insurance the right is enforced by libel in a court of admiralty.[228] The burden of proof is upon the party seeking the application of this doctrine to show that he is entitled to it.[229] The action in courts of equity and admiralty should be brought in the name of the real party in interest.[230] The assignee of a chose in action must sue at common law in the name of the original promisee, unless it be upon a negotiable instrument, in which case he may sue in his own name.[231] But in those states which have adopted the reform codes of procedure, all suits should be brought in the name of the real party in interest.[232] In whatever forum the action may be brought, the right will always be enforced with that equitable discretion which may "best serve the purpose of justice and the just intent of the parties."[233]

GOODWIN CREASON.

University of Missouri.

[225] Mammoth Ins. Co. v. Hutchinson, 21 N. J. Eq. 107; Eaton v. Hasty, 6 Neb. 419; Talbot v. Wilkins, 31 Ark. 411; Meyer v. Mintonye, 106 Ill. 414.

[226] Cole v. Bulman, 6 C. B. 184; Granite Bank v. Fitch, 145 Mass. 567; Hall v. Nash. & Chatt. Ry. Co., 13 Wall. 367; Stephens v. King, 84 Me. 291; Darst v. Thomas, 87 Ill. 222; Edgerly v. Emerson, 23 N. H. 555; Burs v. Beers, 24 N. Y. 178.

[227] Bowers v. Cobb, 31 Fed. Rep. 382; Nipton v. The J. B. Williams, 42 Fed. Rep. 533; The Liberty, 7 Fed. Rep. 226.

[229] Wilkinson v. Babbitt, 4 Dill. C. C. 207; Binford v. Adams, 104 Ind. 41; Griffith v. Townley, 69 Mo. 13; Hunnicutt v. Summy, 63 Ga. 586.

[230] Amazon Ins. Co. v. The Iron Mountain, 1 Flippin, C. C. 616; The Liberty, 7 Fed. Rep. 226; Bliss Code Plead. (3d Ed.) sec. 73.

[231] Bliss Code Plead. (3d Ed.), sec. 45.

[232] Bliss Code Plead. (3d Ed.), sec. 45.

[233] Robinson v. Leavitt, 7 N. H. 99; Danville Poor District v. Mantour Co., 75 Pa. St. 35; Houston Bank v. Akerman, 70 Tex. 315; Bacon v. Goodnow, 59 N. H. 415; Crawford v. Richeson, 101 Ill. 351; Creer v. Bush, 57 Miss. 575; Drake v. Paige, 127 N. Y. 562; Forest Oil Co.'s Appeal, 118 Pa. St. 138.

VACCINATION—REQUIREMENT OF SCHOOL BOARD.

MATHEWS v. BOARD OF EDUCATION OF SCHOOL DIST. NO. 1, OF THE CITY AND TOWNSHIP OF KALAMAZOO.

Supreme Court of Michigan, July 10, 1901.

Comp. Laws, § 4848, provides that parents who shall fail to send their children to school shall be subject to fine or imprisonment, or both. The general school law provides that the district boards shall make suitable rules for the government of schools. In 1894 the school board of district No. 1 passed a rule that no pupils should be admitted to school who had not been vaccinated. Subsequently, while smallpox existed in the state, but not in district No. 1, and while there was no imminent danger of its existence, relator's children were refused admittance to school because not vaccinated. Held that, there being no statutory authority for the adoption of such a rule, the board exceeded their powers in adopting it.

Mandamus by George R. Mathews against the board of education of school district No. 1 of the city and township of Kalamazoo to compel defendant to allow relator's children to attend school without vaccination. From an order granting the writ, defendants bring the case to the supreme court by *certiorari*. Order affirmed.

MOORE, J.: The children of the relator are of school age, in good health. They have not got the smallpox, nor have they been exposed to it. The law of the state makes it their duty to attend school, and it is the duty of the parent to send them. Comp. Laws, § 4847. In case he fails to do so, he may be subject to fine or imprisonment, or both, in the discretion of the court. Comp. Laws, § 4848. The effect of the rule adopted by the school board is to compel the vaccination of the child, or to subject him and the parents to the penalties of the law. The practical result, if this rule can be sustained, is to give the board of education the right to compel compulsory vaccination. It is said that the board does not undertake to compel vaccination, but it simply says that until the child is vaccinated it cannot attend school. We have already shown that it is made by law the duty of the child to attend school, and of the parent to send him; and as long as the broad rule adopted by the board exists, the child must be vaccinated, or it and its parents must be lawbreakers. If the rule was that during the prevalence of the smallpox in Kalamazoo the child could not attend school unless vaccinated, a very different result would be reached. These epidemics never last very long, and the parent and child might well say, if they desired, that they would absent themselves from school during the epidemic; and this could be done without their being lawbreakers. In the case of Duffield v. School District, 162 Pa. 476, 29 Atl. Rep. 742, 25 L. R. A. 152, the record shows that smallpox then existed in the school district. The school board had, because of this fact, and at the request of the board of health, adopted the rule requiring vaccination. A very different case than the case at bar. In Abeel v. Clark, 84 Cal. 226, 24 Pac. Rep. 383, the legislature itself passed a law requiring vaccination, and it was held to be within the police power; but it is not believed that a case can be found where a board of education, under the general power conferred upon it, is held to have the power to pass a general rule shutting the schools against all children not vaccinated. The question has never before been raised in this state, but the principles involved are not new. In Potts v. Breen, 167 Ill. 67, 47 N. E. Rep. 81, 39 L. R. A. 152, the state board of health adopted a rule that no pupil should attend

a public school unless vaccinated, and by their direction the school board excluded unvaccinated children from the school. The power given to the board of health was much greater than that conferred upon the Kalamazoo board of education. In holding that the board of health and the school board had exceeded their authority, the court said: "While school directors and boards of education are invested with power to establish, provide for, govern, and regulate public schools, they are in these respects no wise subject to the direction or control of the state board of health; and, as before pointed out, they have no authority to exclude children from the public schools on the ground that they refused to be vaccinated, unless, indeed, in cases of emergency, in the exercise of the police power, it is necessary, or reasonably appears to be necessary, to prevent the contagion of smallpox. Undoubtedly, also, children infected with or exposed to smallpox may be temporarily excluded or temporarily suspended; but, like the exercise of similar power in other cases, such power is justified by the emergency, and, like the necessity which gives rise to it, ceases when the necessity ceases. No one would contend that a child could be permanently excluded from a public school because it had been exposed to smallpox, or that the school could be permanently closed because of the remote fear that the disease of smallpox might appear in the neighborhood, and that if the school should then be open, and children in attendance upon it, the public would be exposed to the contagion. And, upon the same line of reasoning, without a law making vaccination compulsory, or prescribing it, upon grounds deemed sufficient by the legislature as necessary to the public health, as a condition of admission to or attendance upon the public schools, neither the state board nor any local board has any power to make or enforce a rule or order having the force of a general law in the respects mentioned. * * * However fully satisfied, by learning and experience, a board might be that anti-toxine would prevent the spread of diphtheria, no one would contend that a rule enforcing its use as a condition precedent to the admission of a child to the public schools would, as the law now is, be valid. It is a matter of common knowledge that the number of those who seriously object to vaccination is by no means small, and they cannot, except when necessary for the public health, and in conformity to law, be deprived of their right to protect themselves and those under their control from an invasion of their liberties by a practically compulsory inoculation of their bodies with a virus of any description, however meritorious it might be." In State v. Burdge (Wis.), 70 N. W. Rep. 347, 37 L. R. A. 157, the board of health, under its general powers adopted a rule excluding from the public schools pupils who had not been vaccinated. The school board undertook to carry out the rule. The court said: "The police power of the state is relied upon to support the rule in question. This power has been defined in varying language, but of substantially the same general import. 'All laws for the protection of life, limb, and health, for the quiet of the person, and for the security of property,' fall within the general police power of the government. 'All persons and property are subjected to all necessary restraint and burdens, to secure the general comfort, health and prosperity of the state;' and it has been said that it is 'co-extensive with self-protection, and is not inaptly termed the law of overruling necessity.' It is that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort and welfare of society." Tied. Lim. 2-5; Cooley, Const. Lim. 572; Redfield, C. J., in Thorpe v. Railroad Co., 27 Vt. 140, 62 Am. Dec. 625; Town of Lakeview v. Rose Hill Cemetery Co., 70 Ill. 192, 22 Am. Rep. 71; State v. Noyes, 47 Me. 189. As the police power imposes restrictions and burdens upon the natural and private rights of individuals, it necessarily depends upon the law for its support, and, although of comprehensive and far-reaching character, it is subject to constitutional restrictions; and, in general, it is the province of the law-making power to determine in what cases or upon what conditions this power may be exercised. As applied to the present case, the relator had a right, secured by statutory enactment, to have his children continue to attend the city schools in which they were respectively enrolled as pupils; and they, too, had a right to so attend such schools. Whether it be called a "right" or "privilege" cannot be important, for in either view it was secured to the relator, and to his children as well, by the positive provisions of law, and was to be enjoyed upon such terms and under such conditions and restrictions as the law-making power, within constitutional limits, might impose. There is no statute in this state authorizing compulsory vaccination, nor any statute which requires vaccination as one of the conditions of the right or privilege of attending the public schools; and, in the absence of any such statute we think it cannot be maintained that the rule relied upon is a valid exercise of the rightful powers of the state board of health. The state board of health is a creation of the statute, and has only such power as the statute confers. It has no common-law powers. To lawfully exclude the relator's children from the city schools for the cause relied on required such a change in the existing law as the legislature alone could make,—a change that should make vaccination of pupils compulsory, or at least prescribed it is a condition of the right or privilege of attending the public schools generally, or during the occurrence of certain emergencies, or upon the happening of certain contingencies or conditions in respect to the prevalence of smallpox. The powers of the state board of health, though quite general in terms, must be held to be limited to the enforcement of some statute

relating to some particular condition or emergency in respect to the public health; and, although they are to be fairly and liberally construed, yet the statute does not, either expressly or by fair implication, authorize the board to enact a rule or regulation which would have the force of a law changing the statute in relation to the admission, and the right of pupils of a proper school age to attend the public schools. It is not a question as to what the legislature might do under the police power, about requiring vaccination as a prerequisite to attending school; nor is it a question of whether the legislature could confer this power upon the school board. The board of education is a creature of the statute. It possesses only such power as the statute gives it. The legislature has said who may and should attend the public schools. It has nowhere undertaken to confer the power upon the school board to change these conditions by passing a general, continuing rule excluding children from the public schools until they comply with conditions not imposed upon them by the legislative branch of the government. In what I have said I do not mean to intimate that during the prevalence of diphtheria or smallpox, or any other epidemic of contagious disease, in a school district, the board may not, under its general powers, temporarily close the schools, or temporarily say who shall be excluded from the schools until the epidemic has passed; but what I do say is that the legislature has not undertaken to give them the power, when no epidemic of contagious disease exists or is imminent in the district, to pass a general, continuing rule which would have the effect of a general law excluding all pupils who will not submit to vaccination. I think the learned judge was right in saying the school board exceeded its power. The order of the court below is affirmed.

NOTE—*Right of Boards of Health to Make Vaccination Compulsory.*—There has been much discussion over the right of boards of health to compel the vaccination of school children and of other citizens during the prevalence of a smallpox epidemic, or even when there is no such danger at all. Although the authorities are not uniform, it may be safely affirmed that the decision in the principal case is correct.

Compulsory vaccination is evidently a gross interference of individual liberty and can be justified on only one ground—an "overruling necessity," which also is the only real justification of what is known as the police power. This "overruling necessity" must be a present emergency, in which action is necessary at once in the particular case to avoid impending injury, and not some future danger, not existing at the time, and which may or may not happen. And even in emergency cases, although no authorities have directly so held, it is believed that actual physical compulsion would not be justifiable. The only possible extent of legislation would be to thoroughly quarantine the man who refused to submit to inoculation. The constitutionality of compulsory vaccination has therefore not been determined. In fact, only three cases can be found which involves the constitutionality of such legislation in any form. In the case of Abeel v. Clark, 84 Cal. 226, 24 Pac. Rep. 383, the Supreme Court of California upheld the constitutional validity of a statute requiring that all children attending the public schools should be vaccinated. So also in Bissell v. Davison, 65 Conn. 183, 32 Atl. Rep. 183, 29 L. R. A. 251; Morris v. City of Columbus, 102 Ga. 792, 30 S. E. Rep. 850.

On the general question of vaccination the authorities make one well recognized distinction. Independent of a direct legislative fiat, making vaccination a condition precedent to the entrance of children into the public schools, a school board or a board of health has no authority to promulgate or enforce such a condition, where there is no overruling necessity or present emergency making such a regulation a reasonable exercise of the police power. Potts v. Breen, 167 Ill. 67, 47 N. E. Rep. 81, 39 L. R. A. 152; State v. Burdge, 95 Wis. 399, 70 N. W. Rep. 347, 37 L. R. A. 157, 44 Cent. L. J. 341. In these cases there was no present emergency whatever for the ruling of the board. Thus, in Potts v. Breen, *supra*, it was held that, in the absence of express authority of the legislature, a rule of the state board of health requiring the vaccination of children as a prerequisite to their attending the public schools is unreasonable when smallpox does not exist in the community, and there is no reasonable ground to apprehend its appearance. The doctrine of this case was reaffirmed in the case of Lawbaugh v. Board of Education, 177 Ill. 572, 52 N. E. Rep. 850. In cases, however, of present emergency, as, for instance, where an epidemic has broken out or is raging in the vicinity or in very close proximity as to reasonably threaten to spread itself, a regulation, either suspending the school for a time or suspending certain pupils who refuse to be vaccinated, will be justified and upheld. Duffield v. School District, 162 Pa. St. 476, 29 Atl. Rep. 742, 25 L. R. A. 152; Morris v. City of Columbus, 102 Ga. 792, 30 S. E. Rep. 850; State v. Board of Education, 21 Utah, 401, 60 Pac. Rep. 1013; Blue v. Beach (Ind. 1900), 56 N. E. Rep. 89, 50 L. R. A. 64; Bissell v. Davison, 65 Conn. 183, 32 Atl. Rep. 348. In the case of State v. Board of Education, *supra*, it was held that where no attempt was made on the part of the board of health to compel vaccination, but during an emergency of a smallpox epidemic, an option was given the pupil, who was liable to convey the disease into the schools, to be vaccinated or remain away from the schools until the danger from smallpox was past, the order is justified under the police power inherent in the state, and such power is delegated by statute. The court, however, said: "This holding must not be construed as empowering the board to require compulsory vaccination without the consent of the patient." A strong dissenting opinion by Baskin, J., is interesting as discussing the point that such discrimination amounts to compulsory vaccination, and that the board should close the school altogether if it believe an emergency exists and not make an unfair discrimination not warranted by statute.

Cases relating to regulation for the compulsory vaccination of citizens generally are not numerous. The only one really pertinent authority is that of *In re* Smith, 146 N. Y. 68, 40 N. E. Rep. 497, 28 L. R. A. 820, reversing 84 Hun, 465, 32 N. Y. S. 317. In this case the board of health of Brooklyn ordered every citizen to be vaccinated declaring a special emer-

gency to exist, and "that any person refusing to be vaccinated should be immediately quarantined and detained in quarantine until he consents to such vaccination." The relator refused to obey the order, and the board quarantined his residence and place of business, refusing to permit anyone to enter or leave it. On *habeas corpus* proceedings the court of appeals ordered the release of the relator and held that authority to quarantine persons who refuse to be vaccinated but who are not infected with and are not shown to have been directly exposed to small-pox is not given by statute and was therefore unwarranted.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts

ACCOUNT—Multifariousness.—Where, in an action for accounting, the bill states several separate grounds for equitable relief, but they are so intermingled that all must be determined in order to settle the account, the bill is not multifarious.—Canon v. Ballard, N. J., 50 Atl. Rep. 178.

ACTION—Misjoinder.—Where one of two counts in a declaration fails to state a cause of action, an objection for misjoinder of causes of action fails.—Flint v. Hubbard, Colo., 66 Pac. Rep. 446.

ADVERSE POSSESSION—Municipality.—Adverse possession held not maintainable against a municipality.—Mobile Transp. Co. v. City of Mobile, Ala., 30 South. Rep. 645.

ADVERSE POSSESSION—Part Possession.—One holding part of a tract of land under a deed duly recorded cannot, by executing a deed to the whole tract, extend his holding to the balance of the tract never in actual possession, so that the statute of limitations will run in his favor.—Hill v. Harris, Tex., 64 S. W. Rep. 820.

APPEAL AND ERROR—Refusal of New Trial by Judge Not at Trial.—The rule as to reversal of grant of new trial only for abuse of discretion held not to obtain where application is heard by a judge who did not preside at the trial.—Sands v. Cruikshank, S. Dak., 87 N. W. Rep. 589.

ASSIGNMENT—Action at Law on Equitable Assignment.—An action at law may be maintained against a city on an order given on the city by a municipal contractor, though it constitutes an equitable assignment of a fund owing the latter.—Dickerson v. City of Spokane, Wash., 66 Pac. Rep. 381.

ASSIGNMENT—Assignment to Attorneys.—Attorneys to whom claims of plaintiff's witnesses for fees had been assigned held to have no right of action thereon against defendants.—Flint v. Hubbard, Colo., 66 Pac. Rep. 446.

ASSIGNMENT FOR BENEFIT OF CREDITORS—Attacking Assignment.—A creditor of an insolvent cannot object that assignment is void, while asking to participate in the fund in the hands of the assignee.—Kerslake v. Brower & Thompson Lumber Co., Oreg., 66 Pac. Rep. 437.

ASSIGNMENT FOR BENEFIT OF CREDITORS—Compensation for Assignee.—Where the assignee refused to furnish any information as to the amounts actually realized by him from the sale of the assigned state, or as to disbursements actually made, he was not entitled to any allowance for his services.—Caumiser v. Humpich, Ky., 64 S. W. Rep. 851.

ATTACHMENT—Oppressive Levy.—The levy of an attachment for $76.74 and the probable cost of the proceeding upon five head of racing horses, valued at $1,225, was oppressively excessive.—Anderson v. Heile, Ky., 64 S. W. Rep. 849.

ATTORNEY AND CLIENT—Motion to Set Aside Order of Admission.—After order of admission has been made, motion to set such order aside will not lie. Proceedings for disbarment are the proper remedy.—Neff v. Kohler Mfg. Co. (Mo. App., No. 8374), decided at St. Louis, Nov. 19, 1901.

ATTORNEY AND CLIENT—Profits of Attorney.—Heirs may recover from an attorney of the ancestor's estate all profits made by him in dealing with its assets, though there was no actual fraud on his part.—Beale v. Barnett's Admr., Ky., 64 S. W. Rep. 838.

ATTORNEY AND CLIENT—Settlement With Client.—Where judgment defendants settle with plaintiff in willful disregard of his attorneys' lien, they are liable to such attorneys for the amount thereof.—Flint v. Hubbard, Colo., 66 Pac. Rep. 446.

BAILMENT—Attachment.—Horses in possession of a trainer held not subject to attachment for the trainer's debts.—Anderson v. Heile, Ky., 64 S. W. Rep. 849.

BANKRUPTCY—Partnership Debt.—A debt of a partnership, although a preferred claim under the insolvency laws of the state, is not entitled to priority in bankruptcy as against the individual estate of one of the partners.—*In re* Daniels, U. S. D. C., D. R. I., 110 Fed. Rep. 745.

BANKRUPTCY—Preferences.—Bankr. Act 1898, § 57g, requires a creditor, before he will be allowed to prove his claim, to surrender all payments received after the bankrupt's insolvency, and is not limited to preferences received within four months prior to bankruptcy.—*In re* Abraham Steers Lumber Co., U. S. D. C., S. D., N. Y., 110 Fed. Rep. 738.

BANKS AND BANKING—Withdrawing Certificate of Deposit.—Where a depositors withdraws certificate of deposit before expiration of time limit, he waives interest.—Bank of Commerce v. Harrison, N. Mex., 66 Pac. Rep. 460.

BENEFICIAL ASSOCIATION—Benefits.—Under a beneficial association's constitution and by laws, held, that a husband of a deceased member, who had paid the funeral expenses, was entitled to the death benefit fund, and not the executor of deceased estate.—Radient Temple No. 2, O. U. A., v. Piper, N. J., 50 Atl. Rep. 177.

BREACH OF MARRIAGE PROMISE—Illicit Relation of Plaintiff.—In an action or breach of contract of marriage, evidence of plaintiff's illicit relations with men other than defendant, prior to and during her engagement, held admissible in mitigation of damages.—Clark v. Reese, Tex. 64 S. W. Rep. 783.

BUILDING AND LOAN ASSOCIATIONS—Action Against Assignee.—In an action by the assignee of a building association against a stockholder to recover borrowed money, defendant was not entitled to credit by payments of dues upon stock.—Columbia Finance & Trust Co. v. Swartz, Ky., 64 S. W. Rep. 743.

CARRIERS—Limiting Liability.—Stipulation in bill of lading that value of goods at place of shipment shall limit carrier's liability held against public policy.—Southern Pac. Co. v. D'Arcais, Tex., 64 S. W. Rep. 813.

CARRIERS—Measure of Damages for Loss of Goods.—The measure of damages for loss of goods by the negligence of a carrier is the value of the goods at the place of destination.—Southern Pac. Co. v. D'Arcais, Tex., 64 S. W. Rep. 813.

CHARITY—Want of Trustee.—Where a will created a trust in perpetuity, which executors could not execute, it was a charity, which equity will not permit to fail for want of a trustee.—Jones v. Watford, N. J., 50 Atl. Rep. 180.

CHATTEL MORTGAGES—Priority of Attacking Creditor.—The fact that the mortgagee consented that the surety in a forthcoming bond executed by the mortgagor to release the property from attachment might have a lien prior to that of the mortgagee, in the event he should be held liable on the bond, did not

give the attaching creditor priority over the mortgagee.—Caumiser v. Humpich, Ky., 64 S. W. Rep. 851.

CONSTABLE—Costs for Watchman.—A justice has no right to tax up watchman's costs when the services have not been rendered. And a levy does not *ipso facto* entitle a constable to a watchman's fee. — State v. Stinebaker (Mo. App. No. 8343), decided at St. Louis, Nov. 19, 1901, not yet reported.

CONTRACTS—Agreement not to Sue.— Where one prosecuted for unlawfully selling liquor to the prosecutor's minor son pleads guilty and pays a fine, in consideration of the prosecutor's promise not to sue civil y, the contract is unenforceable as against public policy.—Lucas v. Johnson, Tex., 64 S. W. Rep. 823.

CONTRACTS—Loan.— A consent by a workman that their wages may be retained by the paymaster for 20 days beyond the usual pay day held not a loan of the sums due to the paymaster. — Colorado School Land Leasing & Mining Co. v. Ponick, Colo., 66 Pac. Rep. 458.

CONTRACTS— Validity. — A contract granting the privilege of selling family rights and agencies of a washing machine held not to violate public policy.—Rush v. Broussard, Miss., 30 South. Rep. 635.

CORPORATIONS—De Facto.—Evidence that an alleged corporation is a *de facto* corporation is sufficient proof of its corporate existence to sustain a prosecution against its treasurer for the embezzlement of its funds.—People v. Ward, Cal., 66 Pac. Rep. 372.

CORPORATIONS — Service. — In a personal action against a foreign corporation, which do not do business within the state, service upon an officer or agent temporarily within the state is not a good service on the corporation.—Conley v. Mathieson Alkali Works, U. S. C. C., S. D. N. Y., 110 Fed. Rep. 730.

COSTS—Appeal.—Plaintiff in a bill by partner for relief, withdrawing after evidence is heard, held chargeable with costs of appeal. — Markle v. Wilbur, Pa., 50 Atl. Rep. 209.

COSTS—Motion for Additional Security.—A request for additional security for costs, made after a number of witnesses have been examined, will be denied, where it appears that plaintiff is a poor man, and that such an order would be equivalent to a nonsuit. —Pritchard v. Henderson, Del., 50 Atl. Rep. 217.

COURTS—Jurisdiction.—The fact that the necessary parties were before a court of equity did not give it jurisdiction in proceedings to enjoin trespass and waste in a mine located in a foreign jurisdiction.—Lindsley v. Union Silver Star Min. Co., Wash., 66 Pac. Rep. 382.

CRIMINAL LAW—Definition of "Reasonable Doubt." —A reasonable doubt is not a vague, whimsical, or merely possible doubt, but such a doubt as intelligent, rersonable, and impartial men may honestly entertain after a careful examination and conscientious consideration of all the evidence.—State v. Deputy, Del., 50 Atl. Rep. 176.

CRIMINAL LAW—Proof of Corpus Delicti.—A conviction in a criminal case will not be reversed by reason of the admission of evidence to connect the defendant with the crime charged, before proof of the *corpus delicti*.—People v. Ward, Cal., 66 Pac. Rep. 372.

CRIMINAL TRIAL—Proof of the Corpus Delicti.—Proof of the *corpus delicti* involves two things: First, a criminal act; second, the defendant's agency in the production of the act.—State v. Knolle (Mo. App. No. 8197), decided at St. Louis, Nov. 19, 1901, not yet reported.

CUSTOM — Pound may be Shown to Mean Trade-Pound.—A general custom among thread dealers to deliver ten ounces to the pound is not necessarily immoral. It is competent, in explaining pound, to show that a trade-pound was ten ounces.— Baer v. Glaser (Mo. App. No. 8376), decided at St. Louis, Nov. 19, 1901, not yet reported.

DAMAGES—Nervous Disease.—When the act complained of is malicious or forcible or wanton, with intent to wound the feelings of, or humiliate another substantial damages may be given for mental suffering entailed thereby.— Hickey v. Welch (Mo. App. No. 8278), decided at St. Louis, Nov. 19, 1901.

DAMAGES—Injuries to Mind.—In an action by a father for personal injuries to a son, expert testimony as to injuries to the mind is admissible.—Birkel v. Chandler, Wash., 66 Pac. Rep. 406.

DEATH BY WRONGFUL ACT—Action by Representatives.—Comp. Laws 1897, § 10,427, and How. Ann. St. § 7397, do not give a double remedy to representatives of a deceased person killed by the negligence of another; the recovery being limited to the latter act where the person lives for a short time after the injury.—Dolson v. Lake Shore, etc. Ry. Co., Mich., 87 N. W. Rep. 629.

DIVORCE—Charging Other Offenses as Indignities.— The fact that the acts charged as indignities are such as might be classed under other grounds for divorce, is no objection to their being set out as indignities, provided they are of a sort to render the plaintiff's condition intolerable.- McCann v. McCann (Mo. App., No. 8372), decided at St. Louis, Nov. 19, 1901.

DOWER—Overdue Discharge.—Proceedings to subject land to overdue payments of dower charges should be brought, not before the clerk or by motion, but by an action on the claims.—*In re* Hybart's Estate, N. Car., 39 S. E. Rep. 779.

EJECTMENT—Title Papers as Evidence.—It was not error, in ejectment, to allow public statutes and grants constituting a municipality's title papers to be read in evidence.—Mobile Transp. Co. v. City of Mobile, Ala., 30 South. Rep. 645.

EMBEZZLEMENT—Demand for Returns of Property. —A demand for the return of money embezzled is not an indispensable element to the establishment of the crime.—People v. Ward, Cal., 66 Pac. Rep. 372.

EMINENT DOMAIN—Compensation for Injury to Light and Access.—Under Const. art. 1, § 16, compensation must be made to an owner of abutting property for damage to his rights, light, and access, etc., arising from a street railway company's erection of a trestle in the street.—State v. Superior Court of King Co., Wash., 66 Pac. Rep. 385.

ESTOPPEL—Guarantor.—In an action against a guarantor, receipts issued by the creditor to the debtor held not relied upon by the guarantor, so as to estop the creditor from suing him for the unpaid balance of the debt guarantied.—Atkins v. Payne, Pa., 50 Atl. Rep. 158.

EVIDENCE — Church Record of Baptism.—Where neither the father nor mother was present at the baptism, the church record thereof, containing the date of the birth of the infant, is not admissible to prove such date.—Hickey v. Morrissey, N. J., 50 Atl. Rep. 183.

EVIDENCE—Expert.—A question asked a witness, not a testamentary witness or an expert, as to what sort of woman the testatrix was mentally, held incompetent.—Pritchard v. Henderson, Del., 50 Atl. Rep. 217.

EXECUTORS AND ADMINISTRATORS—Publication of Notices of Appointments.—Under an order, pursuant to Pub. St. ch. 132, § 1, directing an administrator to publish notice of his appointment once each week for three weeks, the publication three times in one week and once the following week is insufficient, and the limitation of actions of chapter 136, § 9, does not attach.—Slattery v. Doyle, Mass., 61 N. E. Rep. 264.

EXECUTORS AND ADMINISTRATORS — Reimbursement from Real Estate.—Executors using money to pay debts which should have been paid legatees, and surcharged with claim of legatees, held entitled to reimbursement from property devised subject to the debts. —*In re* Lefevre's Estate, Pa., 50 Atl. Rep. 185.

EXECUTORS AND ADMINISTRATORS — Right to Sell Property.—Under Code, § 1446, an administrator can-

not be compelled to sell property fraudulently transferred by his intestate and in the hands of innocent purchasers.—Harrington v. Hatton, N. Car., 39 S. E. Rep. 788.

EXEMPTIONS—Divorced Man May be Head of Family.—Where man was divorced, but under legal obligation to support a minor child, he is the head of a family within the protection of the exemption laws, even against the collection of alimony by his divorced wife.—Maag v. Williams (Mo. App., No. 8347), decided at St. Louis, Nov. 19, 1901, not yet reported.

FRAUDULENT CONVEYANCES—Bona Fides.—Under 3 Comp. Laws 1897, § 10,203, plaintiff in a suit to set aside a conveyance as fraudulent held entitled to judgment, where defendant introduced no evidence of the *bona fides* of the transaction.—Wilcox v. Hammond, Mich., 87 N. W. Rep. 636.

HIGHWAYS—Negligent Construction.—A county held not liable for injuries resulting from the negligent construction of a causeway which was the sole work of the overseer.—Rainey v. Hinds Co., Miss., 30 South. Rep. 686.

HUSBAND AND WIFE—Covenants to Pay Money.—Where by articles of separation a husband covenants to pay to his wife a certain sum per month for her support, she may maintain an action in her own name to recover past-due sums.—Mockridge v. Mockridge, N. J., 50 Atl. Rep. 182.

HUSBAND AND WIFE—Information of Wife Abandonment.—It is not necessary to charge that defendant separated from his wife against her will, in an information charging him with wife abandonment.—State v. Fleming (Mo. App., No. 8370), decided at St. Louis, Nov. 19, 1901, not yet reported.

INDICTMENT OR INFORMATION — Verification.—Under Const. art. 3, § 7, and Sess. Laws 1891, p. 249, § 3, a warrant for arrest of a person may issue on an information filed by the county attorney, verified only on information and belief.—State v. Shafer, Mont., 66 Pac. Rep. 463.

INJUNCTION—Labor Strike.—A labor organization whose members are on a strike have no lawful right to maintain pickets around the works of the former employer, for the purpose of preventing non-union workmen from entering or leaving such works, either by force or intimidation, and such action will be enjoined.—Otis Steel Co. v. Local Union, No. 218, of Cleveland, Ohio, of Iron Molders' Union, U. S. C. C., N. D. Ohio, 110 Fed. Rep. 698.

INSURANCE — Absolute Judgment Against Mutual Company.—Where a policy issued by a mutual fire association was an absolute promise to pay a certain sum in case of loss, it is proper that judgment against it should be an absolute one, though the by-laws of company provide that all funds shall be raised by assessments.—Byrnes v. American Mut. Fire Ins. Co., Iowa, 87 N. W. Rep. 699.

INTEREST—Sureties on Bond.—Interest is not recoverable from the surety on a bond who has been at all times ready and willing to pay the amount of the penalty in the bond, where the delay in payment has been caused solely by proceedings for its equitable distribution.—American Surety Co. of New York v. Lawrenceville Cement Co., U. S. C. C., D. Me., 110 Fed. Rep. 717.

JUDGMENT—Res Judicata.—An order, unappealed from, denying an application to set aside a judgment of dismissal, held to be *res judicata* as against a subsequent application therefor.—Wilson v. Seattle Dry Dock & Shipbuilding Co., Wash., 66 Pac. Rep. 884.

JUDGMENT—Return of Service.—Rule to show cause why judgment entered on justice's transcript should not be set aside for insufficient return of service discharged, remedy being by *certiorari*.—Wood v. Dickerson, Del., 50 Atl. Rep. 215.

JUSTICE OF PEACE—Commitment of Prisoners.—A judgment of conviction by a justice of the peace does not become void by failure of the justice to commit defendant on the day the judgment is rendered.—Mann v. People, Colo., 66 Pac. Rep. 452.

LANDLORD AND TENANT—Assignee of Lease.—Where a lease was assigned, and the interest of the assignee sold under a judicial decree, and a deed was subsequently given pursuant to the decree, the assignor held not entitled to recover for rents paid by him subsequent to the decree.—City of Baltimore v. Peat, Md., 50 Atl. Rep. 152.

LIMITATION OF ACTIONS—Partners.—Limitations run in favor of a partner against an accounting at his death.—McBrayer v. Mills, S. Car., 39 S. E. Rep. 788.

MASTER AND SERVANT—Assumption of Risk.—If the plaintiff warned the defendant of the defect and the defendant assured him it would be repaired, and the plaintiff had reason to believe that the machine was reasonably safe, the law did not absolutely require the plaintiff to quit his employment nor does he assume the risk unless the danger was such as to threaten immediate injury.—Herbert v. Shoe Co. (Mo. App., No. 8305), decided at St. Louis, Nov. 19, 1901.

MECHANIC'S LIENS—Costs.—A lienor is entitled to recover the costs of filing his lien notice only in the event of a suit and his prevailing therein.—Young v. Borzone, Wash., 66 Pac. Rep. 421.

MINES AND MINERALS—Location.—Where location of mine by plaintiff was invalid, admission of his location notices, to show discovery, as against defendant making valid location, held error.—Brown v. Oregon King Min. Co., U. S. C. C., D. Oreg., 110 Fed. Rep. 728.

MONOPOLIES—Relief of Monopoly Against a Monopoly.—A railroad company, which is a member of an unlawful combination, cannot invoke the aid of a court of equity for the protection of rights claimed under contracts the terms of which were fixed by such combination.—Delaware, L. & W. R. Co. v. Frank, U. S. C. C., W. D. N. Y., 110 Fed. Rep. 689.

MORTGAGE—Before Patent.—The United States statute prohibiting the alienation of a homestead before the patent is issued does not prevent the homesteader from mortgaging the land prior thereto.—Weber v. Laidler, Wash., 66 Pac. Rep. 400.

MUNICIPAL CORPORATIONS—Assessments.—Where a property owner has not paid a municipal assessment or a reassessment, he will not be heard to deny the validity of the reassessment on the ground that the original assessment was valid.—City of Port Angeles v. Lauridsen, Wash., 66 Pac. Rep. 408.

MUNICIPAL CORPORATIONS—Authority to Tax.—The fact that the city extended its streets outside of its corporate limits held not to give the city authority to levy taxes on property situated thereon. — Pacific Sheet Metal Works v. Roeder, Wash., 66 Pac. Rep. 428.

MUNICIPAL CORPORATIONS—Overissue of Bonds.—Under Const. art. 8, § 6, the overissue of bonds issued with the consent of voters of a city held not chargeable to the amount the city could incur without such consent, so as to invalidate a warrant drawn for a contract indebtedness.—State v. Blake, Wash., 66 Pac. Rep. 396.

NAVIGABLE WATERS—Tide Waters.—A state held to have power to grant the fee of its shores of the tide water to a municipality, subject to the rights of the United States respecting navigation.—Mobile Transp. Co. v. City of Mobile, Ala., 30 South. Rep. 645.

NOTARY—Negligence in Ascertaining Identity.—If grantor of deed is not personally known to notary to be the person subscribing the instrument, he must call in two witnesses, and he must insert in his certificate the names and addresses of these witnesses.—Westman v. Grundon (Mo. App., No. 8381), decided at St. Louis, Nov. 19, 1901, not yet reported.

PARTITION—Orphan's Court.—Orphan's court has no jurisdiction in partition among heirs of lands con-

veyed by an ancestor to a church, with reversion to his heirs in case of abandonment, until abandonment is established in ejectment.—*In re* Bishop's Estate, Pa., 50 Atl. Rep. 156.

PARTNERSHIP—Right of Majority.—Majority of members of a firm may manage the business as they see fit, in good faith, without being liable for losses which could not be foreseen.—Markle v. Wilbur, Pa., 50 Atl. Rep. 204.

PAUPERS — Husband as Pauper Failing to Support Insane Wife. — Under Pub. St., ch. 88, § 3, a husband should not be regarded as a pauper, so as to prevent him from acquiring a residence under Pub. St., ch. 88, § 2, because of failure to support his wife, when transferred by ordered of the state board of lunacy and charity from one lunatic hospital to another.—Town of Shrewsbury v. City of Worcester, Mass., 61 N. E. Rep. 260.

PAYMENT—Receipt.—A receipt for money due is only *prima facie* evidence of payment.—Colorado School Land Leasing & Mining Co. v. Ponick, Colo., 66 Pac. Rep. 458.

PENAL STATUTES—Copy of Commitment Refused to Attorney.—Where plaintiff's attorney demanded that a copy of commitment to a city goal be given to her, not to the prisoner, it is not such a refusal on the part of defendant as to bring his act within the purview of sec. 3603, 1899.—Duff v. Karr (Mo. App., No. 8270), decided at St. Louis, Nov. 19, 1901.

PLEADING—Amendment.—Where finding of master construing answer is reversed by court, and case remanded to master, defendant held not entitled to amend answer on second hearing.—McBrayer v. Mills, S. Car., 39 S. E. Rep. 788.

PROBATE COURT—Appointment of Guardian as a Final Order.—Order of probate court denying application of one to be appointed guardian of the person of an infant, and rescinding a previous order vacating the appointment of another as such guardian, held final order, from which an appeal lies.—Arthur v. Reed, Tex., 64 S. W. Rep. 831.

REPLEVIN—Lack of Jurisdiction.—Where a justice of the peace had no jurisdiction to render a judgment, held, that an action would not lie for breach of replevin bond given in such suit.—Robinson v. Bonjour, Colo., 66 Pac. Rep. 451.

SALES—Condition as to Retail Price.—Where a manufacturer of a patent medicine invariably sells the same under contract providing that the purchaser shall not resell the product lower than a certain sum, the manufacturer cannot restrain sales for a less price by a purchaser from such purchaser.—Garst v. Hall & Lyon Co., Mass., 61 N. E. Rep. 219.

SPECIFIC PERFORMENCE—Lumber Cutting.—Where a contract to cut timber from certain land and saw it into lumber is uncertain, as to the trees to be cut, the court cannot decree specific performance.—Bomer v. Canady, Miss., 30 South. Rep. 638.

STREET RAILROADS—Stopping on Signal.—A street railroad company owes a duty to the public to stop at its regular crossings, on a seasonable signal, to receive those desiring passage.—Jackson Electric Ry., Light & Power Co. v. Lowry, Miss., 30 South. Rep. 684.

SUBROGATION — Exchange of Lands.—Where one agreed to exchange land, but failed to convey within a reasonable time and transferred title to another, the other party had a right to rescind the contract and be subrogated to all rights acquired against such third person by the party defaulting.—Clark v. McCleery, Iowa, 87 N. W. Rep. 696.

TAXATION—Inheritance Tax.—In determining the amount of inheritance tax due under St. 1891, ch. 425, on a legacy with bequests over, the legatee was to be regarded as entitled to an annuity of the sum received by her at the time of the testator's death, the value thereof to be determined by the actuaries' combined experience tables.—Howe v. Howe. Mass., 61 N. E. Rep. 225.

TAXATION—Valuation to Sustain Levy.—Const. art. 10, § 18, providing that all taxes shall be levied on the same "assessment" which shall be made for state taxes, requires them to be levied on the same valuation.—Southern Ry. Co. v. Kay, S. Car., 39 S. E. Rep. 788.

TRIAL — Improper Statements of Counsel.—There can be no reversal for improper statements of counsel in argument, where it does not appear, except in the grounds for new trial, that any objection was made thereto at the time.—Alexander v. Menefee, Ky., 64 S. W. Rep. 855.

TRIAL — Opening Statement.—Counsel held entitled to state the history of the case, and what he proposes to prove in his opening to the jury, unless it is manifest that such proof is incompetent.—Pritchard v. Henderson, Del., 50 Atl. Rep. 217.

TRUSTS AND TRUSTEES — Following Trust Funds.—It must appear that the assets of the estate of a deceased trustee, charged with using trust funds, are greater because the trust property, or its substitute, is actually contained therein, in order to charge the administrator of the trustee with the latter's delinquency.—Pearson v. Haydel (Mo. App., No. 7881), decided at St. Louis, Nov. 19, 1901, not yet reported.

VENDOR AND PURCHASER—Parol Gift of Land.—Where a son, to whom a father makes a parol gift of land, enters into possession thereof and makes valuable improvements, he will be protected in equity against a person afterwards acquiring a conveyance of the lands from the father with knowledge of the facts.—Scott v. Lewis, Oreg., 66 Pac. Rep. 299.

WATERS AND WATER COURSES—Exclusive Privileges.—Contract of water company with borough construed, and held, that the company had not exclusive privilege, so as to prevent borough from erecting its own waterworks.—Boyertown Water Co. v. Borough of Boyertown, Pa., 50 Atl. Rep. 189.

WATERS AND WATER COURSES—Water Rates.—The mere fact that a board of supervisors, in fixing water rates under the California statute, fails to take into consideration the deterioration of the plant, or other matters proper to be considered, does not authorize a court to declare the rates fixed unreasonable.—San Diego Land & Town Co. v. Jasper, U. S. C. C., S. D. Cal., 110 Fed. Rep. 702.

WILLS — Legacy Impossible of Performance.—A legacy bequeathed for a specific purpose, which was rendered impossible of performance through no fault of the legatee, held to have vested in the legatee.—Kelly v. Jefferis, Del., 50 Atl. Rep. 215.

WILLS—Rights of Widow.—Under Code, §§ 3270, 3276, a widow who accepts an annuity from the executor of her husband's will under a void contract to release his estate from all other claims, no copy of the will having been served on her, is not estopped from repudiating the contract and claiming her distributive share.—Newberry v. Newberry, Iowa, 87 N. W. Rep. 668.

WITNESSES—Associate Counsel.—A person who is associated with the counsel in the case, and who takes part in it, is incompetent as a witness in the action.—Pritchard v. Henderson, Del., 50 Atl. Rep. 217.

WITNESSES—Impeachment.—Under Code Civ. Proc. § 2051, testimony tending to show a witness had been guilty of particular wrongful acts held erroneously admitted.—Steen v. Santa Clara Val. Mill & Lumber Co., Cal., 66 Pac. Rep. 321.

WITNESSES—Impeachment Without Foundation.—Where a physician who has treated plaintiff for certain injuries testifies as to his charges in an action to recover for such injuries, and his attention is not called to prior contradictory statements made by him, it is error to admit evidence thereof.—Trumble v. Happy, Iowa, 87 N. W. Rep. 678.